IMT Nuremberg Archives

H – 1248

International Court of Justice

H1248 – 0002

FINAL PLEADINGS

for the

Defendant

H E R M A N N W I L H E L M G O E R I N G

made before the I. M. T.

in Nuernberg

by the Defense-Counsel

Dr. O T T O S T A H M E R

Attorney at law.

H1248 - 0003

INTRODUCTION

May it please the Tribunal!

This Trial - which is of a historical and political importance, and a significance in shaping new laws and which is of dimensions such as have not been known hitherto in the history of law - these proceedings which concern not only the defendants present in the court, but which are of the greatest importance to the German people are now passing into a new phase.

As is stated in article 24 h of the Charter, the defense has the floor.

The position of the defense in these proceedings is especially difficult; for there is an all too unequal distribution of strength between the prosecution and the defense.

Months before the start of the trial the prosecution, with the aid of a huge staff of experienced co-workers was able to explore all the offices and archives in and outside Germany and to examine witnesses in all territories. So, it was in a position to submit to the Tribunal a tremendous amount of documentary material.

The difficult position of the defense is further aggravated by the fact that, in the Anglo-American procedure on which this trial is based there is a clause missing which is contained in the German criminal procedure according to which the prosecution is also bound to procure and submit evidence, exonerating the accused. The prosecution therefore - according to the doctrine that no one can serve two masters - has dispensed with the submitting of such exonerating material to the Tribunal as must surely be present in the archives of foreign countries.

These sources, from which the prosecution drew so abundantly, were unavailable to the defense.

H1248-0004

It had no accesss to offices and archives and furthermore could not examine the archives of foreign countries for material useful in the trial. For this reason its material had to remain incomplete and insufficient even though the defense was considerably aided by the Tribunal in its procurement of material.

After reading of the indictment, Reich Marshal Goering in reply to the question of the presiding judge as to whether he pleaded guilty or not guilty, declared: "Not guilty in the sense of the indictment".

This statement of the accused necessitates an examination of all the charges made by the prosecution.

The accused has of course already dealt with many questions, which are of considerable importance for his defense, during his personal examination. He expressed his opinion in detail with regard to political and military happenings and exhaustively described the motives for his actions, and the origin and course of events.

I am thankful to the high Tribunal for permitting the accused to portray matters in all their breadth, as he saw, felt and experienced them for this, and only this direct personal portrayal can afford good insight into the personal attitude of the accused and make it possible to give a reliable opinion of his personality. This knowledge is absolutely necessary if the Tribunal is to come to a decision, which is not only in harmony with objective law but which also renders the maximum of justice to the individuality of the perpetrator.

H1248 - 0005

I do not consider it necessary - after the accused was heard so exhaustively on all particulars - to deal with every questions, to which he has already given the requisite explanation. In view of this I shall limit the defense to the following statements:

Preliminary History

We are in a transitory period of history of the greatest significance. An age is coming to an end which has been less known for its concept of order than for its concept of liberty. This striving for liberty released tremendous forces - so gigantic that in the end it was impossible to master them. The tremendous progress this era has unquestionably brought about in scientific and technical spheres we have dearly paid for with the shattering of all human order and the loss of peace in the entire world. So far the profound reasons for such a disastrous development have hardly been discussed in this court. But in order to rightly understand the grave crimes and confusion which are indicted here it is imperative to throw some light on the historical background.

The French Chief prosecutor has already pointed out that the roots of National Socialism are to be found in a period far removed from us. He goes back even right to the beginning of the last century. He sees the first step to a leading astray of the German character in Fichtes "Reden an die deutsche Nation".

H1248 - 0006

" Fichte preached the doctrine of " Pan-Germanism " he says, insofar as he wanted to see the world planned and organized by others, just as he himself saw it and would have liked it t be shaped. I cannot understand how this should express more than the universal human desire to take part in the shaping of a common destiny. Only the methods of such attempts to participate, may at times, be justly criticized. A Swiss assertion, which also perceives in Fichte the cause of Germany's going astray, seems to me to be clarifying in this respect. It does not ,however, accuse him of Pan-Germanism, tha is, of the will to subjugate foreign peoples, but rather reproaches him for having attempted at all, to unite the Germans into one nation. It contends, that this was an inadmissible attempt to imitate the French and British, whereas it would have been more suited to the German character to remain a nation made up of different peoples. For only as such could it have continued its historical mission to remain the nucleus of a European federation. Judging by Fichte alone the development is therefore not so easily interpreted.

If one wishes to think historically, one cannot look back and consider Fichte alone. For his "Reden an die deutsch Nation" were only an answer to the "Ruf an Alle" which the French revolution had sent out into the world, and they were directly provoked by the appearance of Napoleon. One must go back over the chain of causes and effects to their very beginning. This ,the beginning of a national and personal striving for liberty, which has characterised the whole of modern times, we find in the Middle Ages.

The colorful play of national and imperial tendencies and struggles which had typified ancient times, was overcome by the conception of one eternal omnipotent Christian church.

H1248 - 0007

With this a state order superseded the dynamic forces of the time, an order which according to the doctrine of the church was created by the Lord himself and was therefore "full of "God's grace" (von Gottes Gnaden). It strove to enfold universally all of humanity and to lead to peace and rest in God. It was the teachers of the church in the Middle Ages who first ventured to subject war to the principles of law. Prior to that it was taken as a matter of course or a natural phenomenon, like sickness or bad weather and was often looked upon as a judgment of God. Men like St. Augustine and Thomas Aquinas opposed this conception and declared that one must differentiate between a just and an unjust war. They did this upon the basis and within the framework of a Christian belief, by which God had entrusted mankind with the fulfilment of a moral world order to bind one and all and which would provide the answer to the question of the righteousness or unrighteousness of a war.

When with the Renaissance and the Reformation the spiritual basis of the medieval order was shaken, this development into a universal world peace took on the opposite character. Life, formerly inclined towards an orderly peace based upon the state now turned into a torrent which, as it swept ever faster through the centuries gradually grew to the present catastrophe. The individual thirsting for freedom dispensed with the shackles of church and class distinction. The State declaring itself sovereign violated the universal order of God, as represented by the church. Not recognizing any superior power, it began to conquer as much living space (Lebensraum) as it could on this earth, as long as the stronger will of another nation did not impose any natural barriers on it.

H1248 - 0008

Peace hence existed only in the naturarally rather unstable equilibrium - of powers, obeying only their own laws.

So came into existence, world empires such as the British Empire, Russia and the United States, the tremendous French colonial empire which as living space today comprise more than one half of the surface of the entire world.

The theory of war as a crime created by Grotius, the teacher of International Law, quoted by the prosecution failed because it was incompatible with the dynamic power of this time. It embodies as we know only an attempt to keep alive through secular arguments the aforementioned concept of Christian warfare. One cannot, however, derive justice from nature alone. It knows no other measure than brute force. It, actually always decides in favour of the stronger. Considered from a metaphysical standpoint, justice can be defined as an independent force, set above natural impuls Therefore the theory of Grotius necessarily petered out in the 18th century as thinking in a purely worldly sense it could not find a criterion for a just war.

This development from the old order to new liberty e.g. the fight of all against all, found its climax and culminating point in the great French revolution. By attempting to set human intellect upon the throne of God, the last consequences of secularisation were drawn. Human intellect, however, proved itself unable to balance the opposing ideals of liberty, equality and brotherliness, that is, to practice justice as such.

From this time on the search for true justice stirs the world . All socialist theories are only attempts of solving this problem. After having been disappointed by the doctrines of too much liberty, mankind once again seeks security and order. Some wish to return to the Christian truth of God while others want to go forward in order to solve the problem through human intellect eventually.

H1248 - 0009

The National Socialists, whose most revolutionary leaders wanted to go further backwards and at the same time forward to a self-deification of life in a biological political sense, have been conquered and eliminated. Yet a solution of the problems of world order has hitherto not been found. The victorious powers intend to come close to it, however, by drawing a line between themselves and the vanquished through a common indictment and punishment of the same as criminals.

Fundamentals of Law.

From whence will they take the standard by which to decide about justice and injustice in a legal sense? Insofar as such standards exist by International Law, valid up to now, further statements are not required. That a special court for the trial was created by the charter of this tribunal I also do not object to. I must, however, vigourously protest against its use, insofar as it is meant to create a new material law, by threatening punishment for crimes which, at the time of their perpetration, at least as far as individuals are concerned, did not carry any punishment.

One cannot, by an act of violence, suddenly create new law after, in centuries of revolutionary development, piece by piece of the old universal principles of law had been abolished and the autonomous thinking of the individual in the moral field had opened gate and door to anarchy. That as we know was the very cause of the general state of anarchy in the sphere of justice from which originated the crimes that are the subject of the accusation, e.g. that one had forgotten to differentiate between Might and justice. The success of so many revolutions over once legitimate rulers "by the grace of God" has shown, that Might, apparently, goes before Right and that the latter can be changed at will.

H1248 - 0010

In this way a general relativation (Relativierung) of the idea of law had come to pass, the socalled positivism of law, which did not bother at all about a moral justification of law.

Can one expect, that hereafter punishment will be recognized as just, if the culprit was never aware of it, because at the time he was not threatened with such punishment, and he believed to be able to derive the authorization for his way of acting solely from the political aims pursued? What does a reference to the ethical laws help, if such must be first found again? According to Justice Jackson's opinion, however, the Nazi Government never from the start was the representative of a legitimate state which had pursued the legitimate aims of a member of the international community. Only from such an attitude can the indictment for conspiracy be understood which is to be discussed later. In fact this (indictment) is far ahead of its time as is the whole way of argumentation by Justice Jackson. Because internationally recognized standards - outside the positive international law - by which the legitimacy of states and of their aims could have been judged did not exist, just as little as an international community as such. Slogans about the legitimacy of one's own and of the illegitimacy of foreign aspirations served only the formation of political fronts just as the efforts to brand political adversaries as disturbers of the peace. In any case they did, indeed, not create law.

Justice Jackson declared justly, that it would have been possible for the conquerors to deal with the conquered as they saw fit. But, said he, non-discriminatory executions or

H1248 - 0011

For this reason he himself proposed judicial proceedings which would have to differ from the ordinary criminal proceeding by not admitting the usual tactics of obstruction and delay by the defendants . But an establishment of guilt wh should be made, but based on a just and fair trial. If the defendants were the first leaders of a conquered nation which had to answer before the law they were also the first ones to whom the opportunity was given to defend their lives " in the name of justice".

If this sentence is to have a meaning then it must be of signification for interpretation of the charter . Because it would not be reasonable that the court were obliged to stand exclusively by the charter without taking into consideration international law recognized hitherto and convictions of others with regard to law. In that case the judgement would rather become a pure dictate of force to appeal against which "in the name of justice" would make no sense.

The Charter may therefore be applied by the court only insofar as its decrees are justifiable before the conscience not only formally but also materially. The Charter itself says that nobody may be excused for a violation of its decrees by hiding behind an order of his government or of a superior.In that case it must apply this, its own logic also to itself by allowing the judge to examine the congruence of its prescripts with the general principles of just ways of thought. For a judge, after all, is far more free and independant from the law maker than - subaltern from his superior or a subject from his dictator.

Nulla poena sine lege praevia

Then there is another question, whether really decrees of the Charter are so much in opposition to the previous and ordinary state of law especially

H1248 – 0012

to the fundamental ideas of all rules of law that the court can not acknowledge them as right or apply them. Practically the most serious problem consists thereby in the decision what should have precedence in the case of conflict, the Charter or the legal maxim "Nulla poena sine lege praevia".

One has tried to justify the exceptional case of disregarding this rule in this given instant with the highly political character of the trial. Such a justification, however cannot possibly be recognized. The political significance of this trial shows itself otherwise by its consequences near and far, but not yet in the very proceedure by influencing the legal norms to be applied. A judge should administer law but not deal in politics. He is called upon still less, to rectify mistakes made by the politicians. Punishment, the establishment of which in due time was neglected, may only be decreed by him on the strength of a subsequent law, if he would do this also in other cases, but not only as an exception to please the politicians.

Because, as a principle the maxim of the division of power is supposed to be maintained . By this principle Montesquieu divided the orginally united power of the absolute King into legislative, administrative and judiciary.The three different forms of expression of state domination were, having equal rank, to be in equilibrium and so to aid in controlling one another. This system of division of powers characterises the modern constitunional state. In a slightly strained way one may define the field of activities and competency of the three different forms of expression of sovereign authority in stating that the legislature has to deal with the future, administration with the present and jurisdiciary with the past.

H1248 - 0013

The legislature sets the standards to which life is to conforms. From time to time these must be changed and put in accord with the changed way of living. But till then they remain valid.

Insofar as a mere establishment of norms of life is not sufficient it will be formed, case by case, by the administration. The administration itself is bound by certain norms, but on principle has free play within the lawful bounds of its good judgement so as to be able to respond to the daily changing needs. For it just as for the law making politician the idea of serving a purpose is decisive.

The judge on the other hand may not decide according to the usefulness but shall decide according to the law. In general it is not his task, to create, but to judge. He has to judge the actions, after they were committed and the conditions after they have arisen whether and in how much they corresponded to the standards respectively what juridical consequences they have brought about. Therefore, as a matter of principle his view is directed towards the past. In the life of the state, which is continuously inspired by politicians looking to the future, he is the steadfast counter-pole serving as a brake.

Though he is bound by the laws decreed by the politician, he is not merely an executive organ. On the contrary he should control the lawmaker by reexamining the laws with regard to their conforming to the constitution. Therein, in any case, according to reason, would belong the examination whether the principle of the division of powers was maintained. Because just as the judge may judge but, "de lege lata" and must leave the decisions " de lege ferenda" to the lawmaker, the latter is obliged in reverse not to meddle with the formers competency by giving laws with retroactive power.

H1248 – 0014

The criticism of the administration of justice of the national socialist state is mainly based on its having abandoned the division of power. By putting at the top the political leadership idea (Fuehrerprinzip) it meddled despotically with the competency of the judges. By means of the police, i.e. the administration, it arrested and imprisoned people without judicial warrant of arrest only for reason of political prevention, and even arrested others that had been acquitted by the judge and set free. On the other hand for political reasons, convicted criminals were withdrawn from the hands of justice. Thereby quite naturally, safety and clarity of the law were seriously endangered.

But not even this national socialist state dared to break downright with the principle "Nulla poena sine lege praevia". In its police measures it renounced its justification by the judge exactly as today the execution of denazification sentences by the regional councils, of the American Zone, on the strength of being "alien to justice" (justizfremd), were justly not placed under the jurisdiction of the Ministry of justice. By three laws, however, the national socialist state decreed an increase in the scope of punishment previously in force with retroactive validity, but the right to punish never had to be established first. The latter case especially did not arise by the fact, that by Article 2a of the criminal Code. The possibility of criminal analogy was created. Because by this Article 2a the liability to punishment was created but not retroactive and everybody was enabled to conform.

Thereby a certain degree of protection against arbitrary judgments and the splitting up of law, lay in the fact that the National Socialist State was based on a specific ideology by which the judge was bound.

H1248 - 0015

Concerning the close connection between, finding of justice and ideology the Swiss Professor of law Hans Fehr Bern already 1927 wrote in his book. "Law and Reality; insight into the growth and decay of the forms of law" ("Einblick in Werden und Vergehen der Rechtsformen"). He says literally:

> "Ohne Weltanschauung schwebt das Recht im luftleeren Raum...Wer keine Weltanschauung besitzt, kann auch keine Rechtsanschauung haben..."

Translation: Without ideology law floats in a vacuum...Anyone who has no ideology, can not have a sense of right or wrong either"....

Fehr showed, that every judge, as far as the law allows him a leeway, judges individually based on his ideology. This under t' symbol of liberal freedom of ideology naturally led to a danger for the uniformity and security of the law. Therefore the liber state especially had to bind its criminal judges particularly closely to the paragraph-facts of a case and forbid them to employ analogies. Fehr already drew attention to the doubts created by a decision based merely upon the facts of the case, whereby the culprit disappears completely behind the deed. He therefore in the dynamical jurisprudence or socalled school of freejurisprudence (Freirechtsschule) proposed a widening of the judicial authority by personal creation of law.

In that direction, as is comprehensible from the above, the non-liberal states that were directed by a precise ideology had the gone ahead. First the Sowjet-Union, after the Marxists had already long ago rejected the liberal, allegedly objective jurisdiction as "bourgeois classjustice", introduced a proletarian class justice (Klassenrecht) which consciously abandoned the idea of the equality of all before the law. The National-socialists according to their racial ideology followed suit by forming the thesis "right is that serves the people, wrong is that damages it". ("Recht ist, was dem Volke nuetzt, Unrecht, was ihm schadet.") Inside such a solid ideological frame the dangers of criminal analogy, which besides were still further narrowed down by Article 2a of the Criminal Code (St.G.G.) dwindled down very much.

H1248 – 0016

In contrast to this a decisive ideological base as a foundation of the Charter is not recognizable. As its signatories stand on very different ideological ground we will have to start out in it, as in the international law valid hitherto, from the liberal idea of freedom of ideology. Therefore the legal thesis "Nulla poena sine lege" should be especially sacred for it. This is also proven by the fact that the Control-Council for Germany, by abolishing the criminal analogy of article 2a of the criminal code, brought the above maxim back again to all Germans most emphatically.

It would be therefore unintelligible and intolerable for the German sense of justice if this sentence were not valid for Germans accused of warcrimes. In itself the charter is an emergency law (Ausnahmegesetz), by the fact alone that it was created only against members of the Axis-powers, and based on an agreement made for one year and then subject to being recalled upon notice. If in addition it should abolish the maxim "Nulla poena sine lege praevia" and moreover so with regard to actions that were not only inside the scope of German legality, but under severe penalty of law had been made a duty by the government of the then sovereign German state, then all understanding would cease for the interpretation that the court were bound by the charter.

Nor does an examination of the political aims connected with the Charter help out. Justice Jackson has called the Charter and the Trials a step in the direction: "To create a juridical guarantee, that who starts a war, will pay for it in person". The American commentator Walter Lippmann stated elsewhere, that the system of collective security for the prevention of wars had broken down. Because nobody was prepared to declare war on the breaker of peace in order to help prevent a war which did not directly affect him.

H1248 - 0017

The means for combating the disease of war would have been just as bad as the disease itself. In consequence of the fiasco of the collective methods the thought to base security in the future upon holding responsible those individual persons accountable for breaking the peace crystallized with the enemies of Germany in the last war. And so it led to the Nurnberg trial. Taking one's starting point from this fact today one could say:.During this second world war revolutionary developments have taken place. It has driven humanity beyond the sphere of what has been the modern age until a short time ago: The first but essential steps to create a world state have been made.

The way to peace, as shown here by Lippmann, will be welcomed on principle although one still will doubt its absolute reliability. Justice Jackson himself has expressed doubts whether punishment will be a warning and help prevent breaking the peace in the future. Only one who is certain of victory will decide to wage a war and so will not seriously consider punishment which will reach him only in the case of defeat. Therefore the educational issue of this trial, to strenghten the sense of justice, seems more important then the effect of deterring which can also be achieved by warning for the future. The politician will have to learn that the principle of division of power will also have to be observed by him and that he will not find a judge willing to mend his mistakes afterwards by punishing on the basis of future laws. The confidence in international jurisdiction, which today still suffers from the suspicion of being easily misused for political purposes, would be raised considerably through such a decree.

H1248 - 0018

On the other hand it would be impaired by passing sdntence for acts of which it is doubtful whether they are punishable. And so even under the view-point of political usefulness the violation of the sentence "Nulla poena sine lege praevia" could not be justified. On the other hand, however, one must realize that the strenghtening in the belief of the inflexibility of justice as the basic pillar of the tremendous dynamic of political forces, serves peace best.

This result can also not be questioned on the basis of the individual considerations presented by the representatives for the defendants.

The French prosecutors have pointed out that a active international law could not be imagined without international morals and that a moral code has to preceed all claims for freedom by the individual as well as by the nations. These certainly are facts well worth considering. Correctly considered, however, they speak only for my viewpoint that the strenghtening of the sense of justice must not begin by violating it.

When the French Chief prosecutor declared that in the future there could be no belief in justice by not punishing the Chief culprits of Nazi Germany, then obviously he went too far in the enthusiasm of the speech. Justice does not grow out of obtaining at any price satisfaction for the violated sense of justice. Otherwise we should quickly arive again at the endless chain of horros, at vendetta. No -, justice demands moderation and consideration of motives and counter-motives. And there the onesided action itself against members of the Axis powers vidates the idea of justice. It is impossible to justify by it a direct violation against it, that is, against the, otherwise, commonly prevailing rule: "Nulla poena sine lege praevia".

H1248 - 0019

The British Chief prosecutor himself declared the possibility of subsequent legislation for one of the most offensive doctrins of the national socialistic legal terminology. With this he meant that the possibility of punishing an act already marked as a crime does not mean a change of the legal situation but only its logic.development, and therefore is permissible. But I do not at all want to contest the institution of the tribunal thereby justified by him. Rather the question arises whether this tribunal is obliged to punish even though no penal law can be found which threatened the offence with punishment already at the time of their committment. The affirmation of this question would go much further then the national socialistic judicial procedure rejected so vehemently by the British Chief prosecutor. He did not present the slightest reason for it and therefore he himself seems to disavow it.

Moreover he should be prepared to admit that the charter would have stated clearly and unambiguously, if it did not only presume but possibly also establish the basis for the punishableness of acts referred to by it. The passage involved in Para. 6 of the charter completely lacks such distinctness. It reads:

"The following acts or any of them are crimes coming within the jurisdiction of the Tribunal",

may be interpreted in the sense of a mere regulation of competence as well as, even though with difficulty, a regulation which first establishing punishableness. Therefore, this passage must in any case be interpreted in favour of the defendant according to the established legal principle "in dubio pro reo". The following sentence:

"for which there shall be individual responsibility"

H1248 - 0020

nor the material regulations for punishment quoted in the following paragraphs, present, according to their wording, no reason for doubt as to their interpretation. However, they contain only modifications for an established punishableness. The tribunal may decide whether or not they are compatible with the principle "Nulla poena sine lege praevia".

Most difficult to understand for me is the viewpoint of the American prosecutor. On one hand he passionately disavows all legal arbitariness of the Nazis. On the other hand he is not prepared to acquiesce in the punishment of the defendants only for those crimes which were not only considered punishable at the time of being committed but also actually threatened with punishment. On one hand he does not want executions or punishment without first having accomplished the determination of guilt in a fair manner. On the other hand he demands a strict application of the charter even though it contains new law surprising the defendants. On one hand he wants the trial to appear to future generations as the fulfilment of the human yearning for justice. On the other hand, in the face of objections to the charter, he bluntly presumes upon the power of the victorious who really could have made short work with the defendants.

It seems to me that he speaks too much as an accuser, the sole role he really wants to assume according to his own words. For the prosecutor, - especially in the Anglo-American procedure -, the word "Justice" has a different meaning, then for the judge or even for the defendant. Unquestionably Justice Jackson thinks of himself not only as a prosecutor but to a high degree also as a politician. To him this trial is to serve not only as an atonement for committed wrong but also, and above all, in order to develop legal principles which at the same time he wishes to enforce by precedent sentence, and

H1248-0021

from which he expects a consolidation of international law meaning prevention of future wars. Anyone who approaches a cause with so many preconceived opinions and intentions lives in a completely different world from that of the defendants, so that from them to it and vice versa, hardly any ways of understanding will be found.

As far as the political side of this process is concerned I already stated why it must not exert an influence on the outcome of this trial. I wish to point out here that a policy which is tested out by the victors on the vanquished and therefore may be charactericed as one of "the weakest resistance", has once before proven to be a failure - namely with regard to the question of disarmament according to the Versailles Treaty-.

If Justice Jackson really foregoes a pure decision of force and is really prepared to become a party of and submit to a legal procedure, although he does not have to do so, then he will have to forego presenting arguments which do not belong into a legal procedure. A hybrid, which is neither a clear act of violence nor a process in the usual sense - although one may try to move it into a half-way position under the name of a political process - such a hybrid is an absurdity. History surely knows other so-called "political" processes of similarly unclear iridescence. I want to point out only the final sentencing of Ludwig XVI. through the French national assembly. There, however, it was clear from the composition of the judicial gremium as well as from the procedure employed, that it was not a matter of finding justice but of a revolutionary act of violence, for which one wanted to be encouraged through mutual exhortations. But here the most outstanding, professional judges were entrusted with the proceedings

H1248 - 0022

by the victorious powers. They were given certain marching routes by the basic charter but otherwise their judicial discernment was granted the most far-reaching authority. There can be no doubt that the politicians called upon the judges asking them to take from them a job which they could not manage themselves. And now the judges will have to decide by their own competence, if and how far they are able to execute the mandate. With the possible remainders the politicians must and will have to manage somehow on their own account.

I was not able to pick a single one from among Justice Jacksons arguments which would cause the tribunal to punish acts, which were not punishable at the time of their perpetration. For this reason I shall explain my view on the individual points of the indictment only from the legal situation prevailing at the time of perpetration.

Conspiracy

Of the crimes of which the defendants are accused conspiracy is most extensive as regards time and object. Professor Exner, in his capacity as a University teacher of criminal law, occupied himself in particular with the importance of the legal conception for our process. In order to save time by avoiding a duplicate report Professor Exner has placed the result of his research at my disposal. In conformity with him I have to present the following regarding this question:

The conception "conspiracy" belongs to the Anglo-American law sphere. There, however, it is not at all uncontested, rather, the opinion is noteworthy as being represented in England that this conception is long since obsolete: "It has been said that in England this law has become entirely disused."

H1248 - 0023

(Report of a judge in Regina v. Parnell and others" - Kenney, Selection of Cases illustrative of English Criminal law, Oxford 1935, p. 145).
In these proceedings, it is a different point that matters. The concept of "Conspiracy", as used by the prosecution, is entirely unknown to German law. I would like, therefore, to begin my short legal argument with two questions which give rise to doubts.

1) May a criminal procedure, which is bent on realizing justice, use legal concepts which are and always have been utterly alien to the defendants and to the legal trend of thought of their people?

2) How would this be consistent with the rule: Nullum crimen sine lege praevia, a principle which the British chief prosecutor has acknowledged as a fundamental principle of civilized criminal law jurisdiction?

Can it be honestly stated that already before 1939 not only the initiating of an illegal war was held to be an act punishable individually, but moreover a "Conspiracy" for initiating such wars? The affirmative answer to this question given by the prosecution has surprised not Germany only. May I clear up, in this connection, a misunderstanding. It has been said that the national socialist state itself had issued criminal laws ignoring the rule: "Nullum crimen sine lege", so that the defendants had no right to invoke this rule. It is by no means my purpose to defend national socialist criminal law, but honesty compels me to say: that this is an error. The 3rd Reich has - as mentioned before - issued three laws increasing the penalty for an action with retrospective effect by applying the death penalty to acts which carried when committed, prison sentences only. But in no case has - till now -

H1248 - 0024

a lawful act been declared punishable, nor an act considered not to be a crime, retrospectively converted into one. And this is the case here.

But the charter, which I follow now, has enjoined the use of the concept of "Conspiracy". I do not, therefore, go any further into these questions. At any rate, it would appear that if such a concept is to be applied to Germans, this could only be done with all restrictions imposed by equity.

Anglo-American law defines conspiracy as an agreement between a number of persons for accomplishing crimes. BLACK, Law dictionary 1933 : "a combination or agreement between two or more persons for accomplishing an unlawful end or a lawful end by unlawful means."

Similar definitions always keep occurring. Two points are characteristic: "Agreement" and "Common plan."

Agreement means an explicit or tacit understanding. If some persons pursue the same end independently of one another, then there is no conspiracy. It is accordingly not enough that the plan is common to all of them, they must have knowledge of this community and every one must voluntarily accept the plan as his own. The very expression " to conspire" involves that everyone contributes knowingly and willingly. A person under duress is no conspirator, duress does not produce agreement, at the utmost in purely external assistance. For instance, if somebody imposes his will on another, then there is no conspiracy. A conspiracy with a dictator at its head is a contradiction in itself. A dictator does not enter into a conspiracy with his followers, he does not make any agreement with them, he just dictates.

H1248 - 0025

Knowledge and will of the conspirators are aimed at a common project. The contents of such a plan can be very different. In English law, for instance, conspiracies are known for committing murder, fraud, blackmail, false accusation, certain economic delicts (Stephen, Digest of criminal law, 6th vol., p. 39, 70, 113, 124, 137, 192, 305, 390.) In all these cases conspiracy is treated as a crime by itself (sui generis) and, therefore, the conspirators are punishable for conspiracy regardless to the fact whether a murder, a fraud or even a mere attempt at such crimes has been committed. According to German terminology we would say: cons iracy is one of the cases, where even preparation of a crime is punishable. Such cases are known to German criminal law. The partner in an agreement for committing a crime against life is punishable. According to Art. 49 b he is punishable for a "crime of preparing any killing" even if the intended action has not taken place. In a certain sense par. 129 can also be applied here. Partnership in an association pursuing certain aims hostile to the state is punishable, again independently of the fact, whether a crime has actually been committed. But if it comes to an action, everybody is charged with his own culpability in this action. If it happens that the individual conspirator is guilty neither as the perpetrator nor as an abettor nor as an accessary of the actual crime, then he can be charged with partnership in an association hostile to the state but not with such a crime.

The prosecutors in this trial are going further. They want to punish, under certain circumstances, the conspirators for individual actions they do not participate in.

H1248 - 0026

To take the most significant example: they want to charge a conspirator even with those crimes, which were committed prior to his entering the conspiracy.

With the scant material at my disposal I was not able to find any evidence as to whether this has any foundation in English or American law. One thing is certain, however, that such a conclusion is utterly contrary to German criminal law. For the latter is based on the self-evident and unanimously accepted principle that one is only responsible for an action when one has been the author, or at least the part author of it.

Let us look now at the Charter : the Charter quotes two cases which are declared as punishable and which fall within the competence of the Court:

1) par. 6a, partnership in a common plan or conspiracy for the perpetration of a crime against peace. As such are listed the planning, preparation, launching and conducting of a war of aggression or of a war involving a violation of international treaties or assurances. It is remarkable that a concept which belongs to the internal criminal and civil law of England and America, is applied here, without more ado, to international facts. The Charter does this by treating individuals who plan or conduct illegal wars, as gangsters participating in a highway robbery. This is legal audacity, because in this case the sovereign state stands between the individuals and the result of their actions, and this removes any foundation from the comparison with facts in international daily life. Up to now the concept of conspiracy has been unknown to international law.

H1248 - 0027

According to art. 6, last par,, of the Charter the partners in a conspiracy or in a common plan to commit crimes against peace, the law of war or humanity are responsible for all actions committed by any partner while executing such a plan. This is, as a matter of principle, quite another thing from the case mentioned in 1). It does not mean punishment of the crime of conspiracy, but responsibility for the individual action of another conspirator. In other words: Conspiracy, as taken here, is not a crime sui generis, but a form of complicity in the actions of the conspirators. Mr. Justice Jackson has given us an example: if three robbers conspire and one of them kills the victim, then all of them through their complicity are responsible for the killing.

Case 2) is of the greatest importance in this trial. The individual conspirator is to be punished for crimes committed not by himself, but by another conspirator. A defendant who had nothing to do with the annihilation of the Jews is to be punished for this crime against humanity only because he was a partner in a conspiracy.

The question at issue is:
In this trial are principles of responsibility to be applied which go beyond our German ones ?

Art. 6 of the Charter says that all conspirators are co-responsible for any action committed by any one of the co-conspirators "in execution of such plan ". These are the decisive words for the interpretation.

In my opinion, the meaning of these words is as follows: the other conspirators are co- responsible for any actions of their comrades which form part of the common plan, or which they therefore have helped think out or have willed or have at least accepted. A few examples:

H1248 - 0028

a) A, B, C, D commit a concerted house-breaking in a villa. They happen to find a girl in the house, and A rapes her. B,C,D cannot be charged for this rape. The reason is that A did not do so, when committing the crime,"in execution of the plan" but if anything, at the "occasion of execution of the plan". The point at issue is not the execution, but merely the occasion arising while executing the plan. This opinion, which should not be disputed, is of importance, as it makes it clear that there cannot be any question of responsibility for all the actions of the partners to the conspiracy.

b) While exploring the villa, B and C come to fight about some piece of plunder, and B knocks down C. This action too was not committed "in execution of the plan", but was foreign to it. A and D are not responsible for this "excess".

c) While exploring the villa, the burglars are detected by the owner. D shoots him. Now the issue depends on the special circumstances of the case. Let us, for instance, go back to the example, quoted by Mr. Justice Jackson, of the three robbers, one of which kills the victim. Considering the nature of American gangsterism, it would appear quite normal that the individual gangsters concerned bore in mind the possibility of such an occurrence, and were quite prepared to approve of it. If this is the case, they are responsible for the killing, as accessories or assistants, also according to our opinion. In such a case, there would be no objection to Mr. Justice Jackson's solution. But if the case is different, if the fatal issue had not been foreseen by the others, could not even perhaps be foreseen - e.g., if they took it for granted that the inhabitants of the house were away from home - then there is no responsibility of the co-conspirators. They are responsible only for acts belonging to the "execution of the plan", and such a common plan includes only what has been foreseen, from the beginning, and approved. Other ways of execution are alien to the plan.

H1248 - 0029

Mr. Justice Jackson's argumentation is fallacious in so far as he derives a common principle from a decision which clearly and obviously happens to apply to the "normal case" of his paradigm of the robbers, and can hardly be applied to any other case. As the case stands, co-responsibility of any single act could be made to apply to those conspirators only, which have foreseen and approved of their comrades' act.

A legal principle extending the fellow-conspirator's responsiblity to such cases as are not included in their com mon responsibility, is alien to German law. Whether it belongs or not to Anglo-American law, the application of such a principle in the present trial would indeed make punishable acts which, heretofore, could not be punished. This would clearly contradict the rule: nullum crimen sine lege praevia, a principle acknowledged explicitly by the British prosecutor too. In view of the fact that art. 6 can be interpreted in various ways, we should select out of two possible interpretations, as corresponding to the author's will, the one which does not contradict the said ru

There exists a withdrawal from a conspiracy, and also a subsequent entrance into it.The question is: What about responsibility for a ts committed during non-membership? The prosecution appears to be of the opinion that a person entering into the conspiracy hereby approves anything previously done by any conspirator, in pursuance of the common plan. Such an assertion seems to arise out of the civil law theory of a subsequent ratification of a business transaction. This theory cannot apply to criminal law. The charter

H1248 - 0030

does not mention anything of the sort as the common plan, the execution whereof involved the act, was common to those who were members at that time. Even if one takes the act of joining the conspiracy to be an approval of its acts so far committed, the approval of a committed crime does not involve partnership in this crime.

The person joining later has nothing whatever to do with these crimes. The same applies to the withdrawal from the conspiracy, the person withdrawing can be made responsible only for what happened during his partnership, even if a result has occurred after his withdrawal. Again any other opinion would lead to the result, that a law "ex post facto" is being applied

Is it now a fact that the 22 defendants have been partners in a conspiracy within the meaning of the indictment, viz. a conspiracy to commit crimes against Peace, Usages of war and Humanity?

If such a conspiracy had existed, then Hitler would have been - nobody doubts it - the leader of these conspirators. It has been already emphasized that a conspiracy headed by a Dictator is a contradiction in itself. Hitler would have laughe if he had been told to have made an agreement with his ministers, party leaders and generals, to wage this or that war or to conduct the war by these or other means. He was an autocrat He did not care for the approval of those men, but was merely concerned about having his decisions executed, whether they ag to these decisions or not. Quite besides this legal considerations, Hitler's environment did, in fact, by no means appear as a community of conspirators, as considered by

H1248 - 0031

the prosecution, and that before the hearing of evidence. Apart from a small party clan, he was surrounded by an atmosphere of distrust. He trusted neither the "defeatist club" of his ministers nor his "generals". Such was already the case before the war, and what his surroundings looked like during the war has been shown by witnesses with great impressivenes . A cunning system of secrecy ensured that plans and aims of the Fuehrer's remained unknown to his collaborators as long as at all possible, so that his most intimate assistants time and again were taken by surprise b, the events, and, in fact, were shocked to learn some of them at the present trial only. This system of secrecy also ensured an isolation of his individual collaborators, as one hand was not allowed to know what the other did. Does this look like a conspiracy? In fact, Hitler complained at times that the generals were "conspiring" against him, and used, strangely, this very word while speaking of those who to-day are charged with having conspired with him. The evidence repeatedly mentions conspirations, but conspirations against Hitler.

From a purely psychological point of view, it is, to say the least, highly improbable that the score of survivors of the 3rd Reich picked out and put into the dock by the prosecution have ever formed a gang of conspirators in the sense of the indictment. Any homogeneity is lacking in this group of people as to outlook, background, education, social position and function, and part of the defendants , only met in the dock.

The prosecution considers the party with its organizations as the nucleus, around which the conspiracy formed. We should,

H1248 - 0032

however, in this connection too, consider the different individual attitude. Some of the defendants have not been party members at all, or, at any rate , not for a long time, and but few of them have played an important part in the party. Some held top positions in the party and its organizations and devoted their entire activity to the aims of these organizations, while others did everything in their power to eliminate from their sphere of activity any influence of party and SS.

The foundation of the NSDAP took place in a period of utter powerlessness of the state and of general war-weariness of the people at a time when, truly, no intelligent person thought of a second war or, even less, about a war of aggression.

But were any of the defendants aims unattainable without war?

Surely, the wishful dream of every true German was the union of all adjoining German territory with the Reich. This applied to the Saar territory, Austria, Memel, Danzig, and, as a hope lingering in the far future, also to the Sudeten territory. They all had been in the past parts of the German Reich, they all would have already returned to the German Reich in 1919; if the right of self-determination solemnly promised to all peoples had been realized. But these objectives of German longing could be reached by peaceful means. And, in Fact, they have been reached without a shot or a stroke with the one exception of Danzig, which would have been done in the same peaceful way if the Fuehrer had had a spark of patience and the Poles a spark of goodwill. But they neither wanted nor believed in a war. Hitler was believed capable of a large-scale bluff, but not a launching the catastrophe of a war.

H1248 -0033

I cannot, therefore, believe in a conspiracy to commit crimes against Peace and usages of war. May I add two points of general importance:

1) The first point refers to Goering's attitude previous immediately to the outbreak of war. He was at that time Hitler's confident friend, the country's second man, and is now the chief figure among the defendants. If there had been, in truth, a conspiracy to launch wars of aggression at that time, then he would have been the second in importance in such a conspiracy, but it was actually he who tried everything within his power, in the last days of August, 1939, to prevent the attack on Poland, and who tried behind Hitler's back to uphold peace. How would this be consistent with a conspiracy for initiating wars of aggression? Nor did he agree with a war against Russia, and he strongly dissuaded the Fuehrer of such a war.

2) If there had been a conspiracy to commit war crimes, then the war would have been waged, from the beginning, with utter ruthlessness and disregard of rules of war. Just the contrary actually, happened. In fact, in the first years of the war, international law was on the whole, respected. Especially in the beginning one endeavoured to wage war with decorum and chivalry. If any evidence is needed, a look into the orders of the German High Command regulating the behaviour of the soldiers in Norway, Belgium, Holland is sufficient proof. Moreover a leaflet with "10 commandments for the conduct of the German soldier in wartime" was issued to the soldiers. Field-Marshal Milch has read them out from his pay-book, during this trial (German record, p.5619). They all obliged the soldier to act loyally and according to international l

H1248 - 0034

A gang of conspirators at the head of the state which plans to wage a war without any consideration of right and morals would really not send their soldiers into the field with a detailed written order saying just the opposite.

I think: If the prosecution believes that these 22 men are conspirators and conspirators against peace, the laws of war and humanity, it is seeing ghosts.

It remains for the defense counsels of the individual defendants to show what relationship their client could have had with the alleged conspiracy.

I just mentioned that Reichsmarschall Goering was the second man in the state; during the trial the prosecution also referred repeatedly to this elevated position of Goering's and tried to make it responsible for the defendant's special guilt pointing out that Goering, by virtue of this special position knew about everything, even the most secret matters, and had the possibility to intervene in a practical way on his own in t course of Government business.

This opinion is wrong and is based on ignorance of the meaning of his position. It meant: <u>According to rank</u> Goering was the second man in the state.

This rank was a consequence of the fact that Hitler, in th fall of 1934 had made a will and by a secret Fuehrer order had appointed Goering as his <u>successor</u> in the government. In 1935 or 1936 this succession was fixed in an unpublished Reichslaw whi was signed by all the ministers.

H1248 - 0035

On 1 September 1939 Hitler announced this law in the Reichsta in this way the successorship of Goering became known to the German people.

Goering's task of deputising for the Fuehrer in the government now followed but only in the event of Hitler being prevented by illness or absence from Germany - thus this occu when in March 1938 Hitler spent a few days in Austria.

During Hitler's presence, that is as long as Hitler exercised his office himself - Goering derived no special powers from the deputyship.

During this time his authority was limited to the offices directly under him and he was not entitled to issue any official directives to other offices.

The consequence was:
As second man in the state Goering could neither rescind, nor change nor supplement Hitler's orders. He could give no orders whatsoever to offices of which he was not directly in charge. He did not have the possibility of giving any binding orders to any other office whether it were an office of the party, the police, the army or navy nor could he interfere in the authority of these offices which were not his own.

This position as second man in the state can not therefore be used as especially incriminating for Goering; it is furthermore not fit to serve as a basis for the assumption of a conspiracy.

The defendant Goering never participated in the drafti or execution of a common plan or conspiracy which was concerned with the crimes stated in the indictment.

H1248 - 0036

As already emphasized before, the participation in such a conspiracy presupposes in the first place that such a common plan existed at all and that accordingly the participants had the intention and agreed to carry out the crimes of which they are accused . These presuppositions are not in evidence in the case of Goering. One has to assume the contrary. It is true that Goering wanted to do away with the Treaty of Versailles and to secure again a position of power for Germany. But he believed he could obtain this goal, if not with the legal means of the League of Nations, at least with political means. The purpose of the rearmament was only to give more weight to the voice of Germany. The Weimar Governments, which could not even express the self-determination of the Germans after 1918 in the surely very modest form of a German-Austrian customs -union, though they advocated this determination themselves, owed the lack of success of their foreign policy for Goering, just as for Hitler, mainly to the lack of respect for the German means of imposing power. Goering hoped, strengthened in his belief by Hitler's surprising initial successes that a strong German army, already by its mere existence would make it possible to secure German aims peacefully, as long as these aims kept within reasonable limits. In politics a state can only have its say and make its voice heard if it has a strong army to back it up, which demands the respect of other states. Only recently the American Chief of Staff Marshall said in his second annual report: The world does not seriously consider the wishes of the weak. Weakness is too big a temptation for the strong....

There was no arming for an aggressive war; not even the Four Years Plan, the purpose

H1248 - 0037

and aim of which has been clearly explained by the defendant himself and the witness Koerner was not aimed at the preparation of an aggressive war.

The General Field Marshals Milch and Kesselring have both testified in perfect agreement that the air force created by the armament program was only a defensive air force, which was not fit for an aggressive war and which was therefore called by them a dangerous air force ("Risiko Luftwaffe"). Such a modest rearmament does not allow for any conclusions of aggressive intentions .

After all this it is clear:

Goering did not want a war.

In his character he was an opponent of war. Outwardly also, in his conferences with foreign diplomats and in his public speeches at every opportunity he has expressed with all possible clearness his opposition against war.

The testimony of General Bodenschatz explains most positively the attitude of Goering to war. He knew him especially from the first world war and he has exact knowledge of the attitude of Goering to war from frequent conversation he has held with him. Bodenschatz states that Goering repeatedly told him that he knew the horrors of war very well from the first world war. His aim was a peaceful solution of all conflicts to spare the German people as far as possib the horrors of a war. A war would always be an uncertain and risky business. It would not be possible to burden with a second war a generation which had already experienced the horrors of one great world-war and its bitter consequences.

General Field Marshal Milch also knows from conversations with the defendant Goering that the latter opposed a war, that he already had not agreed with the occupation of the Rhineland and that he advised Hitler in vain against a war with Russia.

H1248 - 0038

In public the defendant Goering in his many speeches since 1933 frequently emphasized how much he had his heart set on maintaining the peace and that the rearmament had only served to make Germany strong outwardly and to enable her to play a political role again.

His serious and honest will for peace can be seen best from the speech which he aimed in the beginning of July 1938 in Karinhall before all the Gauleiters of the German Reich. He emphasized in this speech energetically th the foreign policy of Germany had to be directed in such a way that under no circumstances it would lead into war. The present generation had still to get over the lost world war; another war would shock the German people. Goering had not the slightest reason to hide his true opinion before this gremium which consisted exclusively of the highest party leaders. For that reason this speech is a valuable and reliable proof for the fact that Goering really and truly wanted peace.

How deeply the defendant Goering was interested in maintaining the good relations with England is shown by his conduct at the conference with Lord Halifax in November 1937 at Karinhall, in which Goering, with full candour, put before Lord Halifax the aims of German foreign policy:

a) incorporation of Austria and the Sudetenland into Germany,

b) Return of Danzig to Germany with a reasonable solution of the corridor problem .

He pointed out at the same time that he does not want war for these aims and that England could contribute to a peaceful solution.

H1248 - 0039

The meeting in Munich in the fall of 1938 was arranged at his suggestion. The conclusion of the Munich Pact is essentially due to his influence.

As, due to the occupation of the remainder of Czecho Slowakia in March 1939, the relations with England had deteriorated considerably as England was very angry about this step Hitler's, which was a violation of the Munich Pact - Goering made serious efforts for the restoration of normal relations.

In order to achieve this goal he arranged the meeting, described by the witness Dahlerus, with English industrialists at the beginning of August 1939 in the Soenke-Nissen-Koog near Husum. In an address he pointed out that under no circumstances must it come to a war with England and he asked those present to contribute to the best of their ability to the restoration of the good relations with England.

When, after the often quoted speech of Hitler's to the commanders in chief of the armed forces on the Obersalzberg on 22 August 1939 the danger of a war became imminent, Goering summoned immediately, that is already on the following day, the witness Dahlerus from Sweden and attempted, by-passing the Foreign Office, to reach an agreement with England for the prevention of the war on his own responsibility.

The objection was raised here that Goering had left Dahlerus in the dark as to his true intentions. His efforts were not aimed at the maintaining of peace but only at persuading England to deny to the Poles the support guaranteed to them and to separate England from Poland, which would enable Germany after this separation to exert pressure on Poland to submit to the German demands or to be able to attack Poland and to realize her plans towards Poland without any risk.

H1248 - 0040

The meeting in Munich in the fall of 1938 was arranged at his suggestion. The conclusion of the Munich Pact is essentially due to his influence.

As, due to the occupation of the remainder of Czecho Slowakia in March 1939, the relations with England had deteriorated considerably as England was very angry about this step Hitler's, which was a violation of the Munich Pact - Goering made serious efforts for the restoration of normal relations.

In order to achieve this goal he arranged the meeting, described by the witness Dahlerus, with English industrialists at the beginning of August 1939 in the Soenke-Nissen-Koog near Husum. In an address he pointed out that under no circumstances must it come to a war with England and he asked those present to contribute to the best of their ability to the restoration of the good relations with England.

When, after the often quoted speech of Hitler's to the commanders in chief of the armed forces on the Obersalzberg on 22 August 1939 the danger of a war became imminent, Goering summoned immediately, that is already on the following day, the witness Dahlerus from Sweden and attempted, by-passing the Foreign Office, to reach an agreement with England for the prevention of the war on his own responsibility.

The objection was raised here that Goering had left Dahlerus in the dark as to his true intentions. His efforts were not aimed at the maintaining of peace but only at persuading England to deny to the Poles the support guaranteed to them and to separate England from Poland, which would enable Germany after this separation to exert pressure on Poland to submit to the German demands or to be able to attack Poland and to realize her plans towards Poland without any risk.

H1248 - 0041

The doubts about the honest will for peace are unjustified; the imputed intention was far from Goering's thoughts.

If this objection is based on the fact that Goering did not inform the witness Dahlerus either of the content of the Fuehrer speech of 23 May 1939 or of the 22 August 1939, this objection is not relevant and nothing is gained by it.

Under no circumstances could Goering inform a third person and especially a foreigner-of these strictly confidential speeches without exposing himself to the accusation of high treason or treason against his country. These speeches were al immaterial for the commission given to the witness, since here was the peculiar situation that Goering - after the efforts of the diplomats had reached a deadlock - knew as ultimo ratio of no other way out than to use his personal rela tions, all of his personal influence and his personal prestig

What alone mattered for the activity of Dahlerus was that the political situation, had become dangerously critical through the quarrel between Germany and Poland, of which also t witness knew and which had to be straightened out by an appropriate attitude on the part of England.

That Goering's aim was not to separate England from Poland has been clearly proven by the fact that Goering, to begin with, had transmitted to the British Ambassador in Berlin, Henderson, the text of the note which contained the propositi made by Germany to Poland - propositions which were called moderate by Henderson - and that, hereby, he tried to come to direct negotations with Poland.

H1248 - 0042

Poland, however, obviously did not want an agreement with Germany. Several circumstances point to that.

a) The conflict with Poland existed for almost one year. Why did Poland not ask for a decision by a court of arbitration on the basis of the concluded arbitration agreement? Why did Poland not appeal to the League of Nations? Obviously Poland did not want any arbitration regarding Danzig and the corridor.

b) The utterance of the Polish Ambassador Lipski to the Counsellor to the Legation Forbes, which was stated by the witness Dahlerus is even more proof for the unwillingness of Poland to come to an understanding.

Lipski said, he was not interested in any note or proposition by Germany; he was convinced that, in the event of a war, there would soon be a revolt in Germany and the Polish Army would march in triumph to Berlin.

This intransigent and incromprehensible attitude of Poland obviously finds its explanation in the fact that she felt too strong and secure by England's assurance.

The reference to the imminent revolt makes one believe that Poland was informed of the plans of the Canaris group to bring about a revolt. There can therefore be no question of an ambigious attitude or false play on the part of Goering.

The serious will of the defendant Goering, to maintain peace and to restore good relations with England is expressly recognized by Ambassador Henderson, who due to his thorough knowledge of the German conditions and his connections with the leading men of Germany had the right opinion also of Goering. I refer here to his book "Failure of a Mission", in which on page 83 it says verbally:

H1248 - 0043

I would like to express here my belief that the Field Marshal, if it had depended on him, would not have gambled on war as Hitler did in 1939. As will be related in due course, he came down decisively on the side of peace in September 1938.

Lord Halifax also, according to the information he gave, had no doubts that Goering's efforts for the prevention of war were sincere.

That after the outbreak of the war, which he had wanted to prevent with all the means at his disposal, but had been unable to prevent, Goering, as Commander in Chief of the air force exerted all his strength to win the victory for Germany is not constrary to the sincerity of his will to avoid the war. From that moment on he knew only his duty as a soldier to his fatherland.

At different times Hitler made addresses to the Commander in Chiefs of the armed forces, so for instance in November 1937, on 3 May 1939 and on 22 August 1939. The defendant Goering, at his personal interrogation has already given extensive explanations as to the importance and the purpose of these addresses. It is important for the question, whether the fact that he was present at these addresses might constitute perhaps a complicity in a conspiracy in the sense of the indictment, that on these occasions Hitler solely and one-sidedly made known his opinion about military and political questions. The participants were only informed what possible political developments Hitler expected. The participants were never asked for their opinion. They also had no possibility to express their criticism to Hitler's opinion. Hitler did not ask his generals to understand his orders. All he asked of them was to carry them out.

H1248 - 0044

His autocratic leadership of the state was exclusively directed by the principle: Sic voleo, sic iubeo, stat pro ratione voluntas, which he carried through to the last consequence.

How rigidly Hitler followed this principle can be seen from the fact that, after the address of 23 May 1939 - as Milch stated in his testimony - he forbade expressly all discussions of those present, even among themselves.

That Hitler was irrevocably resolved to an aggressive war could not be deduced by the participants from the said speeches and they did not deduce it. This has been confirmed unanimously by all witnesses who were present when those addresses were given.

At that time, Hitler had actually not yet planned a war. In that respect the testimony of General Field Marshall Milch is very informative. When this witness, in the month's following the speech of 23 May 1939, repeatedly pointed out to Hitler in personal reports that the air force was not ready for action with their bombing squadrons and that the air force had hardly any stocks of bombs, Hitler refused to give an order for the production of bombs and remarked that this manufacturing was not necessary and superfluous. Hitler persisted in this refusal although Milch pointed out that the production would take several months. Such an order was given by Hitler but on 12 October 1939.

Hitler's exposition before the Commander in Chiefs can be easily explained by the peculiarity of Hitler, to develop frequently political ideas without bothering how to carry them out.

H1248 - 0045

In each case, his practical policy resulted from the requirements of the living development.

Economic Warfare.

The defendant is accused to have ruthlessly plundered the territories, occupied by Germany and thus to have violated the Hague convention concerning land warfare. This accusation is not justified.

During his examination, the defendant Goering has explain, in detail with absolutely noteworthy reasons that the Hague conventions on land warfare from the years 1899 and 1907 respectively cannot be made to apply to a modern war since they had become obsolete and insufficient in some respects at the beginning of World War II. At the time when they were worked out, aireal warfare, economic warfare and psychological warfare were still unknown. Total war which put the entire peopl and the entire national economy without exception at the service of the war, was also not known. Especially, economic warfare was not considered at all. Because of this gap, there is no international law which has been generally recognized, for economic warfare. Therefore, the old statement of Hugo Grotius applies to economic warfare that everything is permitted in war "quod ad finem belli necessarium est".

Naturally, this principle only applies so far as it has not been affected specifically by a differring settlement through treaties.

The following is to be said for the legal situation as it stands:

Until the beginning of World War I., it was generally acknowledged in international law - in any case as far as lar warfare is concerned - that the war does not affect any private legal relations between the citizens of the belligerent states, that private property on principle was inviolable thu that the war would only be pursued with arms and that the enemy civilian population would not be affected by it.

H1248 - 0046

This method of warfare suffered a basic change at the outbreak of World War I, when England, in the field of naval warfare, applied her interpretation of war of people against people. At that time, the enemy powers went over to the course to paralyze the entire German national strength, disregarding all established rules of the law of naval warfare and of neutrality law, by cutting off the necessary raw materials and import of food. This new type of warfare corresponded to the Anlo-Saxon interpretation which was joined by France at the beginning of World War I, that war is not only fought against the fighting troops, but against the entire population of the enemy. The citizen of the enemy state is the enemy of England his property is enemy property which is subject to seizure by the British Government.

With this, naval warfare was not only directed against the combat forces, but also against the peaceful subjects of the belligerent enemy.

This goal was achieved by the total blockade carried out by England. The Hague convention did not contemplate a total blockade in the form in which it was carried out by England. This blockade made any supplying of Germany through neutral countries impossible.

This economic warfare which has also been applied to Germany during World War II in the same manner by the enemy states, is not a legal method of warfare; it involves a violation of established international law.

Under these circumstances, Germany cannot be blamed for applying the method used by England with means of her naval power, for the warfare on land accordingly.

H1248 -0047

This fact leads to the following consideration:

The rules of land warfare (L.K.O.) applies according to its sense to land warfare. There the principle of protection of private property dominates. In naval warfare, however, private property is unprotected. Is it therefore possible that the rules of land warfare (L.K.O.) with their restriction apply also to a combined sea and land war? Would it be just that goods are taken away from one at sea while he would not be allowed to touch the same goods from the one taking the goods on land?

According to established international law, the principle exists now as before that private property is actually inviolable during war. This principle only suffers exception insofar as the Hague convention of land warfare permits certain encroachments on private property - I point out here article 23 g, articles 52,53, paragraph 2 - and insofar as encroachments may also have been caused by a state of emergency in which the state may find itself which then would justified to the extent in which they appear necessary in the interest of self-preservation of the state. In this scope therefore, actions are also permitted during war which would otherwise not comply with the laws of war, and would thus be contrary to international law.

By the fact that enemy warfare disregarded the established rules of naval warfare, Germany was driven into a state of economic emergency.

If the enemy powers would have observed this established law of naval warfare, then Germany could have supplied herself through neutral countries. Therefore the state of economic emergency during the war would not have occured if the blockade of Germany would not have been carried out by means, contrary to international law.

As the enemy powers did not however observe the established blockade regulations, they cannot expect then

H1248 - 0048

from Germany to observe the regulations on requisitioning whic form part of the rules of land warfare (L.K.O.).

And how is the situation today? At present Germany's opponents go far beyond the rules of land warfare (L.K.O.) although until now, no legal foundation e.g. a peace treaty exists, for the measures taken.

Germany came into a state of emergency by the action of the enemy powers. According to the established theory, a prevailing or imminent danger for the state which cannot be repulsed in any other way and which threatens the life interests as well as the independence and existence of the state seriously, is the prerequisite for a state of emergency according to international law.

Thus, wherever the life interests of a state are threatened in this manner, there prevails a national state of emergency which has the legal effect that the state does not act illegally when committing a violation of internationa law which is necessary for the repelling of imminent danger.

The economic situation of Germany was extremely threatening the course of World War II by the action of the powers. Any connection with neutral countries was nearly made impossible for Germany by the total blockade; sufficient supply of raw materials, necessary for of the war, and of food for the feeding of the civilian population was made impossible. Germany also had to take care of the food supply of the enemy civilian population in the occupied territories. Germany was therefore forced for the sake of supporting her own economy, which would otherwise have collapsed, to use the stocks of raw marials and food, available in the occupied territories, and all other items necessary for the continuation of the war for herself,

H1248 - 0049

whereby the interests of the population in the occupied territories were given due consideration. In this, the principles, established in the preamble to the convention concerning the rules and customs of landwarfare, dated 18 October 1907, as they result from the customs existing among civilized nations, from the laws of humanity and from the demands of public conscience, were strictly observed. A resignation of the right to use these sources of assistance in the occupied territories would have meant the abandonment of the indcpendence and existeof the state, it would have meant unconditional submission. emergency which necessarily leads to submission during war, is the highest and most genuine emergency in the life of a nation

By referring to the state of emergency, however, only such actions are covered which are necessary for the alleviati of danger which could not be repelled otherwise. The limitatio naturally fluctuate, and the establishment, whether a genuine emergency act is concerned, cannot be easily made in individual cases. Here the Tribunal will have to consider in favor of the defendants the special circumstances and the conditions which were partly hard to view during the time of war.

It has not been proven that the limitations have remained unobserved by the defendant intentionally or carelessly.

It must be left to the examination of the tribunal whether the defendant personally can be responsible for a violation, possibly committed intentionally or carelessly - a violation which has been committed exclusively by him in his capacity as plenipotentiary of the Fuehrer, or whether in such a case there is only a liability of the state. This side is of the opinion that also in this case there is only a violation of international law which does not call for a personal liability.

H1248 - 0050

Conditions are peculiar in the Eastern theater of war becaus there was no private economy in Russia but only a national economy strictly regulated by a central office. The juridica situation here was that property of the enemy state could generally be claimed as war loot. For the rest, a particular careful regulation was made, which was defined in the so-cal "Green folder". The regulations contained in the "Green folder" did not suggest any looting or annihilation of the population, as asserted by the prosecution. Its tenor was rather the mobilisation of economy and the rules for keeping it going, the seizure and the orderly utilization of stocks traffic-installations in the zones to be occupied in the course of fighting, whereby account had to be taken of the Russian behaviour and the far-reaching destruction to be expected in consequence. The folder does not contain any order or suggestion, which might convict certain groups of the population of activities beyond the needs conditioned by war. This decree, for which the defendant Goering has taken full responsibility does not furnish any reason for an indictment

In all this, one must not disregard on thing:

This war was of such gravity, such proportions, such duration and totality as the creators of the Hague conventio certainly never had or could have had the remotest idea. It was a war in which nations fought for their existance or distruction . It was a war in which all values have changed. Thus the defendant had the right feeling when he declared:

H1248 - 0051

After all there is no legality in the fight for life or death.

From the stand point of necessity a justification can also be found for the deportation of workers from occupied territory to Germany.

In his testimony the defendant stated in detail all the reasons which in his opinion made this measure necessary .

For the rest the defense counsel for defendant Sauckel, Herr Dr. Servatius, will review these matters in detail.

H1248 - 0052

Looting of Art Treasures.

As to the reproach of art treasure looting the defendant has made an inclusive statement of facts, which will be referred to in order to justify his conduct.

In addition it will be observed that Reich Marshal Goering was not directly engaged in the safeguarding of art treasures in Poland.

Not one of these art treasures did he take for his own collection. In this respect the defendant cannot be incriminated in any way. By order of the Fuehrer works of art in France which were owned by Jews were temporarily confiscated for the benefit of the Reich. They were considered as unclaimed property because their owners had left the country.

Of these confiscated objects, with the express approval of the Fuehrer, Goering received but a small part, and not for himself personally, but for the gallery he had planned, and in which he also intended to incorporate the works of art already in his possession.

He wished to acquire these objects at a price established by French art-experts, and the proceeds were to be distributed amongst the dependants of French war victims.

The juridical situation was therefore as follows:

The objects were confiscated by decree of the Fuehrer for the benefit of the German Reich. By this confiscation the former owners lost their right to possession and it was transfered to the Reich. The objects which were left him Goering acquired from the Reich, which was their present owner.

The Reich obviously saw in this a step which, though it was proved premature by the course of events, was to forestall the peace-treaty to be concluded at the end of the hostilities when the final accounts would be made.

H1248 - 0053

This is similar to the confiscations and seizures of property carried out at present in Germany in view of the ultimate peace-treaty.

Therefore the question remains open whether the Reich Government was juridically entitled to confiscate the goods and to become their owner.

A solution to the question is no longer necessary, because Goering acted in good faith in the matter of this acquisition; in his testimony he emphasized his belief that he was entitled to acquire these things as they had been previously confiscated by the Fuehrer.

In consideration of these facts there cannot be any question of looting.

Certainly there could be no objection to the purchasing of articles which occurred during normal business transaction, and which the defendant had been offered spontaneously and the sellers were only too eager to dispose of in view of the good price they received for them.

It is the same case with objects, which the defendant had acquired through a voluntary exchange in which the second party to the contract enjoyed the same rights as himself.

H1248 - 0054

50 Airmen.

I will now consider the accusation of the shooting of 50 officers of the British Air Force after their escape from the prisoner of war camp Sagan.

The act of prosecution(page 33 of the German translation) reads as follows:

In March 1944 50 officers of the RAF, who had escaped from Stalag-Luft III in Sagan were murdered after their recapture. According to a later declaration of the prosecution the circumstances were as follows:

During the night of 24 - 25 March 1944 76 officers of the RAF escaped from the prisoner of war camp Stalag Luft III in Sagan. 50 of these officers were shot by the Security Service after they had been recaptured.

An investigation must be made on the following points: Who gave the order for the shooting ? Did Reich Marshal Goering play any part in this occurrence? Did he actually take part in the drafting of the order to shoot these 50 airmen? Did he agree to the measure although it was a grave offense against paragraph 50 of the Geneva Protocol dealing with the treatment of Prisoners of War?

The prosecution states that the defendant Goering collaborated in the drafting of this order. It refers amongst other things to the reports which Major General Westhoff and criminal-counsellor Wielen drew up while they were in British custody. But the interrogation of these witnesses in court, as requested by the defense counsel, as well as the bringing forward of further evidence which has been so carefully accomplished before the Tribunal has shown in the meantime that the previous statements of Westhoff and Wielen were incorre and only in respect of Goering's presence at the camp conference and his knowledge of the shooting-order were only based on suppositions, which had their roots in the fact that it was a question of a Prisoner of war camp for Airmen. The result of the evidence was as follows:

H1248 - 0055

At this camp conference of 25 March 1944 Himmler reported the escape of the 76 officers to the Fuehrer. For this Hitler severely reprimanded General Field Marshal Keitel; he considered the event to be of great danger to public security, since the escaped officers might assist the 6 million foreigners in Germany in the organisation of an armed revolt. Then Hitler gave the order : "The prisoners remain with Himmler".

Keitel definitely refused the retransfer to Himmler of the 15 officers who had already been recaptured by the Armed forces and returned to the camp, and these officers remained unharmed.

At this camp conference in the presence of Keitel, Hitler did not order the shooting o the prisoners, who were to remain in Himmler's hands. Neither Keitel nor Jodl expected such measures. Jodl expected the escaped prisoners to be sent to a concentration camp for some time. As Keitel and Jodl agree in their testimonies Reich Marshal Goering did not attend this meeting. Therefore it cannot possibly be correct, That Genral Field Marshal Keitel declared in a conference with General Westhof he had been reprimanded by Goering at the camp meeting on account of the prisoner's escape.

General Koller has testified that General Korten assured him over the telephone round about the end of March or beginning of April 1944, that the Luftwaffe, namely the Reich Marshal and Korten himself were not involved in the order and had only been informed of it later . Furthermore Koller certifies that the Reich Marshal was extremely angry about the shooting.

H1248 - 0056

These statements are completely in accordance with the declarations of Reich Marshal Goering, who was on a vacation at the time of the conference with Hitler. The fact of the escape reached him only through a telephone report of his adjutant. It was only after his return from vacation some time around Easter 1944 that he learned, through his chief of general Staff, Korten, about the fact that shootings of prisoners had taken place. Reich Marshal Goering was much upset about this last report because he had only condemned the deed in itself but moreover feared reprisals for his own airmen.

Upon inquiry, Himmler then confirmed the executions to Reich Marshal Goering with the justification that an order to that effect had been issued to him by Hitler.

It is made clear by this conversation how the execution was possible and how its perpetration could remain concealed from the Wehrmacht. In the absence of Keitel and Jodl, Hitler issued the order to Himmler to carry out the execution and Himmler then, unknown to the Wehrmacht, immediately passed on the order to the Reich Security Headquarters - i.e., according to Kaltenbrunner's Statement - to Mueller or, as the case may be, to Nebe.

Not only did Reich Marshal Goering severely upbraid Himmler - because the latter had executed the order without informing Goering - but he raised the most vigorous protest against this measure in a subsequent interview with Hitler. This resulted in a violent argument between Goering and Hitler.

Because Goering strongly condemned such proceedings, he requested shortly afterwards that the prisoner camps be taken in charge by the OKW. On being questioned, Field Marshal Keitel confirmed, as witness, that a few weeks after the occurrence, he received a letter from the general quartermaster of the Luftwaffe, in which the Luftwaffe requested the taking over of its camps by the OKW.

H1248 - 0057

This result of the examination of evidence, which - as already emphasized - straightens out the initial statements of the witnesses Westhoff and Wielen, which are contradictory in many respects, as well as Keitel's earlier declaration of the 10 November 1945, also, vindicates the conclusion that Reich Marshal Goering was in no way involved in this affair, that he condemned it most severely when he was informed of it and that he therefore cannot be called upon to answer for this extremely regrettable and reprehensible order which it was not within his power to prevent.

Lynch Justice.

The prosecution has gone on to the question of "lunch justice" which was practised by the German population in individual cases in 1944 when enemy airmen had been shot down. For these occurrences, the defendants, especially Reich Marshal Goering, are held responsible. The charge that defendant Goering or the Wehrmacht are in any way involved in this action, that they issued orders or instructions to this effect or even merely approved the action is seen to be entirely unjustifiable. The examination of evidence here has thoroughly cleared up the matter in favour of the defendant.

Witness Colonel Bernd v. Brauchitsch pointed out during his interrogation on the 12 March 1946 (page 5680 of the German minutes) that in Spring 1944 there was a sudden increase in the losses among the civilian population through machine-gun attacks by enemy airmen.

H1248 - 0058

To support their charges against Reich Marshal Goering, the prosecution invokes fusi of all a protocol of 19 May 1944 (L. 166) concerning the so-called "Hunting Conference" which was held on the 15 and 16 May under the presidency of the defendant.

Numbered as item 20 of this script is a statement of the defendant, saying he would suggest to the Fuehrer that terrorist enemy airmen be immediately shot on the place of their offence. The defendant most definitely denies having made any pronouncement to this effect and justly points to the following circumstances which belie any such statement:

The session stretched over two days. Numerous technical and organisational questions were discussed. The question touched upon in item 20 had nothing whatever to do with the agenda for the rest of the session, least of all with the purpose of the session. The remark has its place amongst themes which deal with matters of an entirely different kind and has no point in this conjuncture.

Besides, Goering - had he approved and wished it - could himself have immediately issued such an order without further ado, as everyone knew the Fuehrer was well disposed to him.

The decisive fact is that the statement is in the sharpest contradiction with the fundamental attitude of the defendant. He always stood for the view that the enemy airman who is shot down is his comrade and must be treated as a comrade, a fact which I have already remarked upon in another connection. Moreover, in the question as to how terror airmen are to be treated, he has defended his position with all frankness against the conception upheld by Hitler and has made no secret to Hitler of his entirely different opinion.

H1248 - 0059

In view of this unwavering attitude and its resulting policy, it is utterly out of the question that he should suddenly have urged Hitler to issue the above-mentioned order against the terror airmen - an order which he opposed with all his might and the execution of which he sought to prevent by every means as soon as it came to his knowledge. And he did succeed in fact in preventing the execution of this order.

If the terror airmen were actually discussed at the session, this discussion could only have occurred with the implication that the Fuehrer suggested such a measure.

With reference to the minutes, the following fundamental remarks must be added:

We have here the combined notes of a young officer, stretching over a two-day session during which there has been a great deal of talking and cross-talking. Experience made in many other cases has shown that such recordings are often very unreliable and have even at times reproduced the subject of the discussion in an utterly perverted form, precisely because the author of the script, - especially when several participants were present and were talking at random, - could not follow the course of the discussion and consequently did not reproduce the substance of it accurately, especially when, in addition to this, he was relayed by other people. This explains many factual errors as well as the inadequacy and unreliability of such records.

The minutes were never submitted to the defendant. He has not therefore been able to verify their contents nor to correct their errors.

Records of this sort, which are built up in the way described above and which are not submitted to the perusal and approval

H1248 - 0060

of the parties concerned are worthless in the production of evidence. They cannot in themselves alone serve as an adequate means of proof either to charge or convict the defendant. They can therefore only be made use of to the detriment of the parties implicated when the contended facts are confirmed by other material brought for evidence from sources external to these minutes. In the present case, there is no confirmation from other evidence that Goering actually made the statement contained in item 20 or made a request to Hitler to that effect.

The note dated 21 May (731-PS) fails to provide support for the claim. The note: "General Korten teilt nach Vortrag des Reichsmarschalls mit" can not, in view of the defendant's undisproved statement, possibly mean that the Reich Marshal delivered an address on this matter in Hitler's quarters, but solely that Korten reported on this subject to the Reich Marshal and that Korten informed the Reich Marshal of Hitler's order.

The rest of the examination of evidence has made it clear beyond doubt that Goering was against a special treatment of enemy terror airmen who had been shot down, and that he opposed Hitler's order.

These attacks by enemy airmen were directed, within Germany, against civilians working in the fields, minor railway lines without any military importance and against pedestrians and cyclists.

H1248 - 0061

Hier lag eine grobe Verletzung der Haager Landkriegsordnung vor, nach der jede Kampfhandlung gegen die friedliche Bevölkerung des Landes untersagt, jeder Angriff oder jede Beschiessung unverteidigter Stätde, Dörfer, Wohnstätten oder Gebäude verboten ist.

Dieses offensichtlich völkerrechtswidrige Verhalten hatte nach Ansicht des Zeugen v. Brauchitsch Hitler Veranlassung gegeben, neben Abwehrbefehlen auch Befehle zu Massnahmen gegen diese Flieger selbst vorzusehen. Hitler vertrat hierbei - soweit dem Zeugen bekannt - die schärfsten Massnahmen; der Lynchjustiz sollte freier Lauf gelassen werden.

Diese Stellungnahme Hitlers zu den Völkerrechtsverletzungen der feindlichen Flieger fand indessen nicht die Billigung der Wehrmacht, insbesondere nicht des Reichsmarschalls Göring und seines Generalstabschefs, des Generals Korten. Beide verurteilten zwar die ausschliesslich gegen die wehrlose Zivilbevölkerung gerichteten Angriffe feindlicher Flieger aufs schärfste. Sie verwarfen aber trotzdem die schutzlose Preisgabe der abgeschossenen Flieger an die empörte Volksmenge zur Vornahme der Lynchjustiz und sahen in diesen Massnahmen kein geeignetes Mittel zur Bekämpfung dieses völkerrechtswidrigen Verhaltens.

Im gleichen Sinne äusserte sich der Zeuge General Koller. Diesen Zeugen hat Anfang Juni 1944 General Korten darüber unterrichtet, dass der Führer die Absicht habe, einen Befehl dahin zu erlassen, dass Terrorflieger der Volkswut preisgegeben werden sollten.

In wiederholten Besprechungen sind der Zeuge Koller und General Korten übereinstimmend zu der Ansicht gelangt, dass die Auffassung des Führers abzulehen sei. Sie haben wohl die direkten Angriffe der feindlichen Tiefflieger gegen einzelne Zivilpersonen, Frauen und Kinder, Ansammlung von Zivilpersone, spazierengehende Schulklassen und Kindergär-

ten-, Bauern bei der Feldarbeit, sowie die Angriffe gegen Personenzüge des öffentlichen Verkehrs und Lazarette für grausam gehalten; beide sehen aber auch in dem beabsichtigten Führerbefehl keinen gangbaren Weg und keine Lösung des schwierigen Problems. Sie waren der Ansicht, dass ein solcher Befehl in Widerspruch stand zur soldatischen Grundauffassung, zu den Kriegsartikeln und zu dem Völkerrecht, und dass er Veranlassung zu zahlreichen Missständen geben würde, durch die auch andere feindliche wie eigene Besatzungen zu Schaden kommen müssten. Endlich konnte ein solcher Befehl auch in seinen Auswirkungen auf die Moral eigener Besetzungen schädlich wirken.

Alle diese Gründe geben der Wehrmacht Veranlassung, das Verlangen Hitlers abzulehnen, und das Bestreben der Wehrmacht war nun dahin gerichtet, die nicht gebilligte Auffassung Hitlers zu verhindern. Der Zeuge v. Brauchitsch gibt daher glaubwürdig an, dass nunmehr von der Wehrmacht nach einem Ausweg gesucht wurde, der darin gesehen wurde, dass nach oben hin Massnahmen vorgetäuscht wurden, die nicht zur Ausführung gelangten.

Der Zeuge Brauchitsch erhielt den Auftrag von Reichsmarschal Göring mit dem OKW. über die Festlegung des Begriffes der Terrorflieger zu sprechen. In den anschliessenden Besprechungen und im Schriftverkehr wurden die Fälle rörtert, die völkerrecht widrige Verstösse darstellten und als verbrecherische Handlunge anzusehen waren. Durch diese Feststellung sollte eine Lynchjust verhindert werden. Der sich über einen längeren Zeitraum hinziehende Schriftwechsel zeigte die Tendenz der Dienststelle, die Angelegenheit möglichst in die Länge zu ziehen.

Mit Recht hebt Zeuge Koller hervor, dass dieser Schriftwechsel alle Merkmale eines "Gefechts auf Zeitgewinn" aufweist, d.h. die Beteiligten wollten entweder keine Entscheidung, oder eine solche so lange wie irgendmöglich verschieben.

H1248 - 0062

H1248 - 0063

This constituted a gross violation of the Hague Rules of Land Warfare, according to which any combat act against the non-combatant population of the country is prohibited, and any attack or shelling of open cities, villages, residences or buildings is forbidden.

According to the opinion of the witness v. Brauchitsch this behavior which quite evidently violated internatiol law caused Hitler to order measures against these aviators themselves, besides defensive measures. Relative to this Hitler advocated - as far as it is known to the witness - the most severe measures; lynching justice was to be given the right of way.

This stand of Hitler toward the violations of international law by enemy aviators, however, did not meet with the approval of the Armed Forces, especially not with that of Reich Marshal Goering and that of his Chief of Staff (Generalstabschef), General Korten. Both of them did condemn to the utmost the attacks of enemy aviators which were exclusively directed against the defenseless civilian population. However, they nevertheless opposed the handing-over of defenseless shot down aviators to the aroused mob for the carrying-out of lynching justice, and they did not think these measures an appropriate means of combating this conduct which was in violation of international law.

The witness General Koller expressed himself to the same effect. Early in June 1944 General Korten informed this witness of the fact that the Fuehrer intended to decree an order to the effect, that terror-aviators were to be surrendered to public fury.

In the course of repeated conversations the witness Koller and General Korten arrived at the opinion that the conception of the Fuehrer was to be rejected. They did consider the direct attacks of enemy low-flying planes on individual civilian persons, women and children, concentration of civilian persons, school-classes

H1248 - 0064

and Kindergardens out on walks, farmers at work in the fields, as well as attacks on public passenger trains and hospitals as ruthless; however, neither did the two see a passable road or a solution of the difficult problem in the Fuehrer's order. They were of the opinion that such an order was contrary to basic military conceptions, the articles of war and to international law, and that it would give cause to numerous evils through which also other enemy as well as own crews would have to come to harm. And finally such an order could exercise also in its effects, a harmful influence on the morale of our own crews.

All these reasons caused the Armed Forces to reject Hitler's demand, and the attempts of the Armed Forces were now directed toward preventing the disapproved conception of Hitler. The witness v. Brauchitsch therefore credibly states, th the Armed Forces now looked for a way out which way was seen in the fact, that the higher command levels were deceived by measures which were not actually carried out.

The witness Brauchitsch was ordered by Reich Marshal Goering to define in discussions with the OKW the concept of terror-aviators. In the subsequent discussions and exchan of correspondence those cases were mentioned which represent violations of international law and which were to be consider criminal acts. By this definition of the concept a lynching justice was to be prevented. The exchange of correspondence which lasted for a longer period of time showed the tendency of the agency to prolong the matter as much as possible.

The witness Koller is justified in emphasizing that this exchange of correspondence shows all signs of a "delayi action to gain time", i.e. those concerned either did not wa any decision, or they wanted to postpone it as long as only possible.

H1248 - 0065

In particular the margin note on document 785 D (Exhibit GB 318), entitled: "No answer received from Commander in Chief of the Air Force", allows for the conclusion that the Reich Marshal purposely wanted to prolong the matter. Furthermore Reich Marshal Goering, as can be seen from the letter of 19 June 194 (D 779) maintained the opinion, that in every instance he considered legal procedures also against terror-aviators as definitely necessary. If it is stated in a subsequent document of 26 June 1944: "The Reich Marshal agrees with the announced formulation defining the concept of terror-aviators and with the suggested procedure", then the agreement with the procedure refers exclusively to the suggested procedure of publication suggested in the final paragraph of the letter of 15 June 1944, for which Reich Marshal Goering's approval had been requested. That the Reich Marshal until the end of the war maintained the old aviator-standpoint, according to which enemy aviators as soon as they have been shot down are to be considered and treated as comrades - was not only expressly deposed by the witness General Field Marshal Milch, but is also empahsized by General Koller with the following words: "Undamaged by occasional expressions of displeasure the attitude of the Reich Marshal always remained correct and valiant in accordance with his frequently empahsized flying tradtition which he had retained from the First World War . In understandable anger about great difficulties in the air defense, pressed by the Fuehrer, he perhaps for once used harsher words, which were quickly forgotten", and the witness does not know of any case "in which such a spontaneous displeasure caused the Reich Marshal to take incorrect or harsh measures against members of the enemy air forces".

The behavior of the air force as a whole was also correct and humane at all times. To fight chivalrously was a matter of honor with the

H1248 - 0066

German aviators. The Air Force as well as the defendant Goering retained this point of view, although as Koller expressl mentioned the flying personnel felt extremely bitter over the strafing attacks on German crews suspended on parachutes, and individual hotheads spoke of equal measures as reprisals.

The best testimonial for the exemplary comradely behavio of the Air Force even toward an enemy, who did not observe the rules of warfare can be clearly seen from the description of the witness Koller about the establishment of a sea-emergency-service of the Air Force, which brought aid to Germans as well as the enemy in an equal measure and which carried on despite enemy attacks in violation of international law, with its attempt to provide aid for both friend and enemy in need. Accordingly it must be determined:

The Armed Forces and the defendant Goering have rejected the lynching justice as well as all procedure against the terror-aviators, not in accordance with legal regulations and have not issued any orders to troops under his command; in no case have enemy aviators been shot by the Air Force or by the Army, or handed over to the Security Service (SD).

Gestapo - K.Z.

The prosecution accuses the defendant Goering of having established a reign of terror in Prussia immediately after 30 January 1933 in his capacity as Prussian Minister of the Interior and soon afterwards as Prussian Minister President in order to suppress all opposition against the Nazi-program.

In order to carry out his plans he had used the Prussia police, which he had ordered as early as in February 1933 to protect the new government by proceeding ruthlessly

H1248 - 0067

against all political opponents without consideration of the consequences.

In order to safeguard the power, he had created the feared Secret State Police and established concentration camps as early as spring of 1933.

To these accusations the following is to be said:

It was natural and cannot serve as an accusation against the defendant, and it would rather have been a severe violation of the duties entrusted to the defendant, if he had not devoted himself with all his strength to the safeguarding of the new government and taken every imaginable precaution in order to make any attack on this new government impossible fro the very beginning. In order to achieve this goal first of all the police institutions had to be considered.

It only remains to be examined, if the means, whose application the defendant considered necessary, were objectionable: -

The question is to be answered in the negative because of the following considerations:

In every state the police is the inner-political instrument of power; in every state it has the task to support the government, to protect it in all directions and to render the disturber of the peace and the violator of the law harmless by force of arms, if necessary. The defendant transferred the same tasks to the police under his direction, whom he ordered in the speech mentioned by the Prosecution, to act energeticall and to fulfil their duties conscientiously. To what extent such an appeal for the performance of duty should not be permissibl remains incomprehensible.

In his interrogation the defendant Goering described expressly , for what reasons and along which lines he considered a reorganization of the police as necessary and carried it out

H1248 - 0068

Against these directives no objections whatever can be raised.

I should like to point out in this connection that - according to the recognized rules of international law a sovereign state has the right to regulate its internal affairs as it deems fit to do.

The reform of the police is an exclusively internal affair. The violation of rules, generally recognized by international law is, therefore, out of question in this respect.

A political police was in existence before the assumption of power as well. Before the 30th of January 1933, it was called Department Ia, which among other things had to watch and to fight political adversaries, Nationalsocialists and Communists in particular. Such a police dealing with the same tasks was also needed after the assumption of power in order to protect the new state against attacks, which threatened it in particular from the very strong Communist Party.

In order to make clear that this department of the police was charged exclusively with safeguarding the state against enemies of the state it was named Secret State Police.

As long as the defendant Goering was head of the police this was, in fact, only the case until 1934 as then Himmler was put in charge - he strictly confined himself to the tasks prescribed to him, did not transgress his authority and no misuse of power occurred. The evidence produced has shown nothing against the defendant Goering for this period of time. Should, at a later date, the Secret State Police have transgressed their authority and should have committed illegal acts the defendant had no knowledge of them and did not approve of it. For mistakes and crimes committed by his successors which remained

H1248 - 0069

unknown to him, he can not be held responsible.

There appeared in court a witness whose testimony was very incriminating for the defendant: Dr. Gisevius.

The defendant refuses on principle to deal with the statement of this witness. He only wants to point out that this statement is untrue in all points incriminating the defendant.

The demonstrative force of this statement depends on whether this witness is considered to be trustworthy or not.

My fellow defence counsel Dr. Nelte has agreed to deal with this question extensively, so that - in order to avoid repetitious statements I shall refrain from further declarations.

H1248 - 0070

Of course, the assumption of power by the National Socialist party met with resistance, and particularly the leftist parties were anything but satisfied with the situation thus created. The opponents were by no means weak, neither numerically nor in the means at their disposal. The new rulers were, therefore, afraid of serious dangers to their power, if they let the opposition parties continue their activity without hindrance; they had accordingly to take preventive measures against such dangers in good time. In order to stabilize their own power and to nip in the bud any possible source of unrest, the defendant Goering considered it necessary for reasons of state to settle at one blow both leaders and officials of the communist party and its organizations. The defendant has spoken at length about his reasons for such acts. For the removal of danger and to ensure the safety of the state, the measures taken by the defendant were, for the government, a necessity caused by the unsettled nature of the times. As it was a preventive measure, it was not necessary for a provisional arrest that a criminal act against the government had already been committed or was, obviously, on the verge of being committed. The fact of membership in itself and previous activity in the said party was enough for arrest, as it was a political act of self-protection on the part of the government.

Such considerations led, very soon after the assumption of power, to the establishment of concentration camps, of which there were 2 at the time when defendant Goering was at the

H1248 - 0071

head of the police, The aim of such camps was to hold provisionally politically unreliable persons, who might be of danger to the new state, until they either had adapted themselves to the new political conditions or until the power of the state had become so great that such persons could no longer endanger it.

The legal basis of this institution was the Reich President's decree of February 28th,1933, for the protection of people and state. Reich President v. Hindenburg issued this decree on the basis of Art. 48 par. 2 of the Reich constitution, in order to prevent communist armed risings dangerous to the state; accordingly, the decree was perfectly constitutional. The decree temporarily suspended certain constitutional rights, and declared legal, amongst other things, the restriction of personal liberty.

The establishment and use of concentration camps was founded, according to the defendant's ideas at the time, on the revolutionary conviction of the victorious movement; that only in it was historical truth contained; that it alone represented the right way, and that, therefore, everything was wrong that stood in its way.

There was no possible discussion of the right political concept, based on logical arguments, as in philosophically neutral liberalism, but only the totalitarian establishment of a popular regime based on creed as the historically necessary truth.

Any person not caught up by this movement, but, on the contrary, opposing it, was, therefore, to be removed as an enemy of the true order. Under such conditions, the person concerned could not merely be punished for an infringement of specific rules according to the traditional course of justice, but , according to the opinion of the national-socialist government, he deliberately excluded

himself from the newly - found community of the people, and from every foundation of any possible legal institutions. He had, therefore, to be removed. There was, accordingly, no punishment, but a political purge, based on philosophical intolerance. Therefore, no tribunal or administrative procedure, was allowed , on behalf of the persons concerned for the examination of the police proceedings. The individual who excluded himself from the community was not entitled to legal guarantees which the constitution provided for his fellow- countryman. And a fellow-countryman was he only, who recognized such a community. In handling enemies of the people not only legal principles were applied, but also the viewpoints of the reason of state.

Since it was an act of political expediency, the dfendant Goering could decide in some cases on his own responsibility, that there was no necessity for further confinement, and could use all his influence to procure the liberation of individuals, who did not endanger the security of the state. In this case, it was not a question of an act of grace breaking through any legal principle, neither was it tantamount to an acknowledgment of an injustice donn to the other persons concerned ; it simply was an act undertaken from the point of view of expediency, and each case could be decided and differently on its own merits.

Such principles in handling elements which could not fit into a totalitarian political rule, are not only specifically national-socialistic, they completely dominate the policy of the victorious countries towards the conquered German population. Anyone who does not obey the newly-risen democratic order in Germany, anyone even, of whom an essential opposition to democracy can be expected because he was pounded in national socialism before, is being interned. Whereas - according to exhibit R 129 of the prosecution - 21.000 people were interned at the beginning of the war, in Nazi Germany

H1248 – 0072

H1248 - 0073

more than 300.000 national-socialists and militarists are detained in internment camps, merely in the USA zone, according to figures published by the occupation powers.

A recently published decree of the "Laenderrat" in the American occupation zone confirms the fact that such acts of political purging are not legal, but political acts. This decree removes from the authority of the administration of Justice and tranfers to the authority of the general administration of the state all worker's camps, in which Nazi's are interned who have been sentenced to hard labour on accot of their party membership; and this decree is issued because of these camps not having anything to do with the administration of Justice.

No different were the considerations which influenced the defendant Goering, when he created concentration camps in 1933 and issued laws concerning the Secret State Police (Geheime Staatspolizei). These were intended to be as he conceived them, a means of cleansing and strengthening the young community of the people. He did not aim at a definite annihilation of political enemies but after a certain period of education interceded generously for liberations, and discharged at Christmas 1933, about 5.000, and in September 1934 2.000 prisoners.

He vigorously counteracted inevitable abuses and errors which he openly admitted in the book he published in 1934, intended for the British public: "The Building of a Nation" He let, for example, the Communist leader Thaelmann personal report to him about his complaints in the concentration care

H1248 - 0074

and took care to remove their cause. He dissolved the so-called "wild camps" of Stettin and Breslau, punished the Gauleiter of Pomerania, who had organized this camp without his knowledge and against his will, and had those responsible for these wild concentration camps brought up on trial for their infringements of the regulations .

This attitude of the defendant Goering denotes, that he never intended the actual physical annihilation of the prisoners. If the prosecution establishes that this was all in execution of a conspiracy which aimed at committing crimes against Humanity, such an interpretation has no bearing on the reality of political life in the years in question. Such a conspiracy did not exist, nor was it the intention of the defendant to commit crimes against the principles of Humanity nor has he committed any such crimes. As one of the political trustees of the German government, he felt himself bound to safeguard it against dangerous disturbers of the peace and to contribute accordingly to the permanence of the National-socialist way of life. Far from looking upon such measures as criminal, considered them on the contrary, to be the inevitable means of consolidating the political order as a basis of all law.

In 1936, the leadership of the police and, therefore, the management of the concentration camps, passed from the defendant to the Reichsfuehrer S.S. Heinrich Himmler. The defendant cannot be held responsible for the subsequent evolution of the concentration camps; for the fact that they became especially after the autbreak of the war, more and more gruesome places of torture and death, and led - partly intentionally partly through the chaotic war conditions - to the death of countless people, so that finally, in the last days before the breakdown of Germany, and through errors in organisation they turned into one vast graveyard.

H1248 - 0075

Certainly he knew that there still were concentration camps, also that the number of inmates had risen because of war tensions, and that they also contained foreigners because of the expansion of the war machine over all of Europe, - but the horrible occurences as they have been disclosed in this trial were unknown to him. He knew nothing of the irresponsible experiments which were being carried out on inmates because of misinterpretation of true scientific spirit. The testimony of witness Field Marshal MILCH has shown that the Luftwaffe was not interested in these experiments, and that the defendant personally did not learn anything specific at all about this matter.

By no means, did the establishment of concentration camps as such have anything to do with the later extermination of Jews which apparently originated in HEYDRICH's and HIMMLER's brains and was kept secret in a masterly manner, and was disclosed after the collapse as the horror of Auschwitz and Maidan.

This brings me to the Jewish question.

The defendant GOERING has explained in detail his views on the Jewish question during his interrogation as witness; furthermore, he has shown in all their details the reasons which influenced the National Socialist party and after the seizure of power, the state to take a hostile attitude toward Jews.

The defendant is reproached for having promulgated the Nuernberg laws in the Year 1935 which were intended to keep the race pure, and that in his capacity as Commissioner for the Four Year Plan he issued decrees during the years 1938 and 1939 which had as their aim the exclusion of Jews from economic life.

Furthermore, he is blamed for a number of other laws which meant a one-sided and serious intervention into the legal sphere of Jews.

H1248 - 0076

The legal reason for this reproach which is devoid of any foundation, is obscure.

For here it is a question of a purely domestic problem - namely the regulation of the legal position of one's own subjects; according to internationally recognized legal opinion at that time, the German Reich as a sovereign state could freely settle such a problem.

Even if these encroachments were harsh and the limitations of citizenship rights were extremely severe, they nevertheless in no way comprise an offense against humanity.

Such legal provisions which limit a certain race or a certain circle of citizens in their legal position, have also been made by other states without offense being taken at such measure or without other states considering themselves induced to intervene. Reich Marshal Goering always refused any illegal or violent action against Jews. This is clearly shown by his attitude toward the action against Jews during the night of 9 to 10 November 1938, instigated by Goebbels, of which he was informed only after the deed had been done, and which he condemned most severely. In this respect, he raised serious objections with Goebbels and Hitler. On this matter, the precise statements of witnesses BODENSCHATZ and TOERNER are available. The testimony of Dr. UIBERREITHER shows how greatly GOERING disapproved of this action. According to the former, the defendant summoned all Gauleiters to Berlin several weeks after this incident and in an address censured the violent action with the sharp words that this action did not correspond to the dignity of the state and that it had caused serious damage to German prestige abroad.

H1248-0077

That the defendant was no race fanatic, became generally known by his expression: "I decide who is a Jew." It has been established sufficiently that he aided many Jews.

He was informed only at the end of the war about biological extermination of the Jews. He never approved such a measure and opposed it with all his might. For he had too much political insight not to recognize the tremendous and at the same time senseless dangers which would perforce result for the German people from such a brutal and detestable extermination drive.

Goering had already proved by the above mentioned speech to the Gauleiters that he did not wish to ruin himself in the eyes of the world public and world opinion because of the treatment of Jews.

It is therefore out of the question for Goering to have agreed to such an undertaking or for him to have participated in it in any manner. It is understandable if it is held against the defendant that he should have been informed about such horrible measures as the second man in the state.

Furthermore, it is no wonder if such statements of the defendant that he knew nothing of these atrocities, are met with a certain amount of mistrust.

Despite such doubts, however, the defendant insists that no informati about such acts ever reached him.

This ignorance of the defendant - which can be completely understood only by one familiar with German conditions - may be explained from the fact, - and this is the sole solution of the riddle - that HIMMLER, as was also emphasized by General JODL during his interrogation, knew most masterfully how to keep his actions secret, to obliterate all traces of his atrocities and to deceive the surrounding world and even his and Hitler's closer entourage.

H1248-0078

In this connection, I also refer to the testimony of witness HOESS who confirms HIMMLER'S instruction concerning absolute secrecy toward everyone.

The question may come up here: Did not the legal obligation exist for the defendant to instigate investigations about this matter and to get reliable information as to the true whereabouts of supposedly evacuated Jews, and as to their fate? And what legal consequence results if he carelessly refrained from such investigations and thus carelessly violated his legal obligation to act incumbent on him by virtue of his position? The decision of this extremely complicated question of law and fact may be left undecided because Goering, even as the second man in the state did not have the power to prevent such measures if they were carried out by Himmler and were ordered or at any rate approved by Hitler.

H1248 - 0079

Conclusion

If we now review the personality and life of the defendant GOERING the following viewpoints have to be considered for th appreciation of his actions:

Of good educational and characterological background he received his decisive impressions as a young officer and combat airman during World War I during which he proved an outstanding man and was awarded the highest award for braver, the order of "Pour le merite". He experienced the collapse of the German war effort as - as it was seen by him - a consequence of German treachery from inside.

After the rule of the Kaiser (Kaiserreich) had been overthrown, the German people wanted to give themselves a new constitution on a democratic basis and then hoped to be able to work their way up again by industry and perseverance. In this, the confidence in the far-sightedness of the victori powers of that time, especially in the 14 points of Wilson, played a great part.

But when the treaty of Versailles utterly frustrated these hopes, the Weimar democracy came into a serious crisis from which it was not to recover any more. The latter together with world economic crisis which was added later on formed the prerequisite which could not be ignored for the fact that Hitler was able to seize power.

As first, the "fight against Versailles" made his rise as a party leader possible. Goering as witness described how he agreed with Hitler during their first meeting in the conviction that nothing could be achieved by paper protests.

The powerlessness of the German democracy became apparent now to the entire world. Goering as well as Hitler were convinced that Germany infallibly would become a victim of Bolshevism if it was not possible

H1248 - 0080

to awaken against the latter sufficient defensive strength by the reestablishment of German self-confidence at home. It was understood that they also had to stand up with rigour against the Versailles powers. But in this, Hitler started out without question from the fact that Germany belonged basically to the West, culturally, economically and even politically. He believed that the Bolshevist danger, at first directed against Germany, would afterwards also threaten the Western countries. He, therefore, was of the opinion that he would be able to find gradually also their recognition and support if he took up the ideological struggle against the East.

From this basic attitude alone is it possible to explain his entire policy until the actual collapse. May one today rightly condemn it as having failed from the beginning; one must not forget that, at first, many things in the development clearly seemed to justify it. Thus it can be explained how Hitler succeeded in winning over an increasing part of the Germans to his following.

Goering sincerely believed that salvation could only come through Hitler. He recognized in him the born national leader who understood to influence the masses and to guide them and who, driven by a fascinating strong will, could not be frightened by any obstacle. He realized that under a democratic constitution only such a man of certainly demoniacal-demagogic talent could survive. And therefore he joined him.

Because Goering was an honest German, only inspired by love for his fatherland, he did not think of using Hitler only as a tool for his new rise to power. He rather took it upon himself from the beginning to recognize in him the sole man vested with authority, namely the "Fuehrer", and to be satisfied with a subordinate role. He the famous air force captain and "pour le merite", did not hesitate

H1248 - 0081

to swear to Hitler, then still an unknown man the oath of allegiance, an oath which was to be valid for his entire life and was valid.

It is tragic that a fight which Goering waged together with Hitler, could be so completely misunderstood as to lead to accuse him of a conspiracy, entered into from the beginning for the purpose of committing crimes.

His aim was at first directed to free Germany from the shackles of the treaty of Versailles, Although the Weimar government has made repeated attempts to achieve a liberation from the especially burdening obligations of this treaty, Germany was not successful in her andeavouring for a revision.

One made no progress by negotiations.

Did not international law appear to be an instrument in the hands of the victors of Versailles to keep Germany down permanently? Was it not true in the world that might went before right and would the Germans only achieve then something when they got up the courage to hit on the table forcibly with their fists?

Such considerations appear absolutely understandable from the situation of that time. To construe from them even a proof for the conspiracy as stated by the prosecution, would mean a complete misunderstanding. Actually, the development after 1933 appears to justify Hitler completely. He easily achieved with his methods many more times, than what - if given freely - would have kept the Weimar government in power.

The German people could only recognize, in the willingness of the foreign countries not only to conclude treaties with Hitler - such as the naval agreement of 1935 and the Munich pact of September 1938 - but also to participate in the party rallies to the end, the fact that Hitler had chosen the correct road for reaching international understanding.

H1248 - 0082

This impression and this judgment were also absolutely correct until the fall of 1938. If Hitler would afterwards have observ loyally the Munich agreement, then he would probably have taken the arguments out of the hand of the "stop" policy carried out against him. Not only would the peace have been kept, but Hitler could also have harvested the fruits of his domestic and foreign policy, carried out until then and recognized by all powers.

Basically, one argues today only whether the development since then with its catastrophic consequences are to be charged solely to him or who has to share the responsibility. All Germans who followed Hitler at any time and in any way, are accused. For, as it is said by the prosecution, above all those who did not trust him from the beginning with anything good and who deprived his government from the beginning already of legality: "That could be seen from the beginning that it would end as it did !" Thus, everyone who supported him at any time and in any way, is therefore also guilty.

This accusation must be objected to because it constructs looking backwards from this sad result an obligation which must annihilate all belief not only in freedom, but also in the insight of man. Naturally Hitler did not desire the end as it now happened either. He has often enough announced publicly that he was not out for the laurels of war, but that he would like to devote the rest of his life to peaceful reconstruction.

Looking from a truly objective vantage point, one can only accuse that he did not limit his goals when he could no longer believe in their achievement by peaceful and human means.

H1248 - 0083

If under such means only those are understood, which are to renounce force generally in any form, then he need not have gone his own way and have looked for a new solution. A certain play with force as long as it does not degenerate will therefore have to be left at his disposal. Where the degeneration began can because of the lack of other points of reference be surmised only from the results, which he actually caused with his policy. Most certainly he did not foresee and intend the bad results. However, it will have to be considered as his guilt, that he would never let himself be taught by his failures, but only let himself be led to increasingly exorbitant acts. How much of this guilt, however, can and may be charged also to his followers?

Whoever did not reject Hitler's methods and thereby him personally from the very beginning as illegitimate, found difficulty in recognizing where Hitlers political aims came to an end, to give justifying reasons for his measures, and where afterwards his politics became a crime. In this respect the border from the standpoint of purely German law sentiments surely ran along a line considerably different from that of other nations or mankind, in particular. Because the latter for example, were hardly interested in the maintenance of the Weimar constitution and the basic rights granted by it to the individual German. Its violation therefore up to the 2nd World War has never caused other states to intervene with the German government. On the other hand, once the war had broken out, the Germans were forced to give precedence to German interests over their sympathy with members of other, especially the enemy states. Each of them believed to be doing enough, if he took care in his field, that unnecessary hardships were avoided. To rebel against orders which came from the highest German command would not only have appeared completely senseand hopeless, but until shortly . . .

H1248 - 0084

until the bitter end it would also have been a violation of German legality, and thereby a criminal injustice. Accusations that no rebellion was undertaken, can therefore be raised only, if the breach of formal legality without consideration of the immediate practical effect only on behalf of the principle, ergo the attitude of a revolutionary, could be defined as a legal obligation.

The consequences of such a conception are so far from the point, that it cannot be mentioned seriously at all. Because the hitherto existing international law was primarily based on the unlimited sovereignty of the states. No state was willing to submit in vital decisive questions to the judgement of others, however great a majority it may be or however independant a tribunal it may be. And now every individual citizen of such a sovereign state was supposed to have not only the right in relation to the other nations or humanity, but even the duty to rebel against the legal power machine of his own state, because the latter violated human rights and the rights of humanity? Such an imposition, made retroactively, pronounces its own sentence. It would place the autonomy of the individual above state sovereignty. Thereby the strength of the individual person would not only be innumerably overestimated, but this would have to lead to the breaking of the last ties of traditional order, to anarchy. Compared to such a manner of thinking Goering almost represents the exact opposite pole. As others went into the war, in order to fight war as such, so he became a revolutionary in order to give back honor to the concept of loyalty. Thus having once cast his lot with the Fuehrer he has stood by his side even after he had already lost the latter's confidence for a long time, yes, even after he had been sentenced to death by Hitler. He remained loyal until today in spite of everything by confirming to excuse Hitler before himself. To many this may appear incomprehensible, and many may see more

weakness than strength in it. In this loyalty, however, the man reveals his whole nature. Goering has been described in the press as a late Renaissance type; and there is something in this. Although of hig intelligence, he has allowed himself to guided in his actions less by considerations of common-sense t by the feelings of his impetuous heart.

Such a man expresses himself of necessity in a way that is primarily subjective. He not only sees his surroundings and oth people impassionately as immovable quantities he has to reckon with, but he rather and above all is sensitive to the effect they have on him and how they call for his approval or disapproval, so that he finally makes his personal reaction to them the basis of his judgment as a whole.

In this, as can be seen from the statements of the General Supreme Staff Judge Dr. Lehmann, he always showed himself at pains to remain just and to lend an ear to considerations of sentiment. He always kept himself free from doctrinal prejudice as a soldier and expert he always endeavoured to hit on the right factor in the individual case. His judicial decisions, als his social attitude, which General Bodenschatz testified to amongst other things, show his serious moral feeling of responsibility. His attitude towards all criminal acts directed against the honor of women are proof of his chivalry. But he tak nodogmas for his standards in this only the spontaneous judgment of his feelings, not only the intellect, therefore, but life. From life he derives his ideas and the values which determine hi actions.

Therefore the Fuehrer and the oath of loyalty he had taken meant everything to him and was the substance of his life. Ambassador Henderson had already judged Goering correctly, when he wrote about him:

"He was the perfect servant of his master, and I have never seen greater loyalty and devotion than he maintains toward Hitler

He was recognized as the second power in the country, and always gave me to understand, that he was Hitler's natural successor as leader. Men in secondary places often tend to emphasize their own importance. In all the open discussions in which I engaged wi Goering, he never spoke of himself or the great part which he had played in the Nazi revolution; Hitler had done everything, al confidence was confidence in Hitler, every decision was "itler's and he himself was nothing."

This judgment still applies today. But his loyalty became his disaster, and the world for him sank into ruins. He certainly recognized many a mistake of the past, but he never showed the regret, which many would like to see with him. He thereby remains true to himself, as well. With this the picture of his character ends.

In a period which is still threatened by chaos and which is again searching for a firm foundations for life, the positive value of such loyalty too should not be ignored.

H1248-0086